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REPORTS OF CASES

COURT OF APPEALS

STATE OF NEW YORK.

VOLUME CXXIX.

ALBANY:
JAMES B. LYON.
1892.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING DECISIONS OF DECEMBER 1, 1891,
TO AND INCLUDING DECISIONS OF JANUARY 20, 1892,

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
STATE REPORTER.

VOLUME CXXIX.

ALBANY:
JAMES B. LYON.
1892.

Entered, according to Act of Congress, in the year one thousand eight hundred and ninety-two,

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Rec. May 3, 1892

JUDGES OF THE COURT OF APPEALS.

WILLIAM C. RUGER, CHIEF JUDGE.[1]
CHARLES ANDREWS,
ROBERT EARL,[2]
FRANCIS M. FINCH,
RUFUS W. PECKHAM,
JOHN C. GRAY,
DENIS O'BRIEN,
ISAAC H. MAYNARD,[3]
ASSOCIATE JUDGES.

SECOND DIVISION.

DAVID L. FOLLETT, CHIEF JUDGE.
GEORGE B. BRADLEY,
JOSEPH POTTER,[4]
IRVING G. VANN,
ALBERT HAIGHT,
ALTON B. PARKER,
CHARLES F. BROWN,
JUDSON S. LANDON,[5]
ASSOCIATE JUDGES.

---

[1] Died January 14, 1892.

[2] Appointed Chief Judge, January 19, 1892, *vice* RUGER, Ch. J., deceased.

[3] Appointed Associate Judge, January 19, 1892, *vice* EARL, J., appointed Chief Judge.

[4] Resigned November 28, 1891, to take effect December 7, 1891.

[5] Appointed November 28, 1891, to take effect December 7, 1891, *vice* POTTER, J., resigned.

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CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

COMMENCING DECEMBER 1, 1891.

GEORGE G. MANNING et al., Respondents, *v.* LOUIS P. BECK et al., Appellants.

129-647.
130-429
136-442.

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The provision of the General Assignment Act (Chap. 466, Laws of 1877 as amended by chap. 328, Laws of 1884, chap. 283, Laws of 1886 and chap. 503, Laws of 1887) invalidating preferences in an assignment for the benefit of creditors except to the amount of one-third the net value of the assigned estate, was not intended to and does not prevent a creditor from obtaining payment of, or security and thereby a preference for, his debt even from an insolvent debtor, and while *it seems*, if he accepts such a security with knowledge that the debtor intends to make an assignment, that the security was executed in contemplation thereof, and that it will result in a violation of the provision of the act, the security will be void; if the creditor accepts it in ignorance of any such existing intent on the part of the debtor, the provision does not apply, and the security is not rendered invalid by the fact that the debtor does thereafter execute an assignment.

Berger v. *Varrelmann* (127 N. Y. 281), distinguished and limited.

White v. *Cotzhausen* (129 U. S. 329), distinguished.

(Argued October 6, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made on the first Tuesday of January, 1891, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

Statement of case.

The plaintiffs in this action were, at the time of the commencement thereof, judgment creditors of the defendant Louis P. Beck, and they brought the action against him, and William H. Beck and H. Israel Weinberg, for the purpose of setting aside a bill of sale executed by Louis P., to William H. Beck, and an assignment without preferences for the benefit of creditors, executed by Louis P. Beck to the defendant H. Israel Weinberg. The complaint alleged that the bill of sale and the assignment were executed for the purpose of hindering, delaying and defrauding the creditors of the defendant Louis P. Beck, and it set forth various facts supporting, as the plaintiffs alleged, that statement. The complaint also alleged that the making of the bill of sale by Louis P., and its delivery to the defendant William H. Beck, and the making of the general assignment to the defendant Weinberg, were all parts of one transaction, and that such papers were executed in order to avoid the statute forbidding the preferring of creditors in a general assignment to an extent greater than one-third of the assets of the person making the same. The plaintiffs demanded judgment that the assignment to the defendant Weinberg should be adjudged fraudulent and set aside; also that the bill of sale should be adjudged fraudulent as against these plaintiffs, and that the defendant William H. Beck should be directed to transfer and deliver the property mentioned in the bill of sale, or so much thereof as might remain in his hands at the commencement of this action, to a receiver to be appointed by the court, and that he should in the meantime be enjoined from disposing of, or meddling or interfering with, such property; also that the defendant William H. Beck should be directed to account for and deliver to the receiver the proceeds of the sale of any property which had been or might thereafter be made by him; also that the defendant Weinberg should be directed and required to account for and transfer to the receiver all the property which had already or which might thereafter come into his hands as such assignee, and that the receiver should, after paying out of the fund so coming into his hands his law-

ful commissions and expenses, dispose of the same in payment of these plaintiffs' judgments, and that such judgments should be declared a lien superior to all other claims upon the funds and property coming into the hands of such receiver.

The defendants by their answer denied all allegations of fraud and also any intention to hinder, delay or defraud the creditors of Louis P. Beck, and also denied various other of the allegations in the complaint.

Upon motion at Special Term, a receiver of the defendant Louis P. Beck was appointed to take possession of and hold all the estate, debts, property, equitable interests and things in action of the defendant Louis P. Beck, transferred to the defendant William H. Beck, or to the defendant H. Israel Weinberg, by the general assignment already referred to. The receiver was directed to hold such property pending this action. The action was tried before one of the justices of the Supreme Court sitting in equity, and judgment was thereupon ordered for the plaintiffs and a decree was entered setting aside the bill of sale from Louis P. Beck to the defendant William H. Beck, and also the general assignment from Louis P. Beck to the defendant Weinberg, as fraudulent and void as to these plaintiffs. It was further decreed that the defendant William H. Beck should account for and deliver to the receiver appointed in the action all the property transferred to him by the bill of sale, as well as the proceeds of all sales of such property, or any part thereof, as might have been made by him, and that he should account for all the property sold by him before the appointment of the receiver, to the full value thereof. It was further decreed that the defendant Weinberg should account for and turn over to the receiver all the property which passed to him by the assignment; that the several judgments so recovered by these plaintiffs against Louis P. Beck were and each of them was a lien superior to all other claims upon the funds and property coming into the hands of the receiver; that the receiver should, after paying his lawful commissions and expenses, pay to the plaintiffs in this action, respectively, the amounts of their several judgments, with interest upon each

Statement of case.

from the time of recovering the same; and within thirty days from the entering of the judgment, the receiver was directed to make and render an account, and distribute the funds in his hands in accordance with the judgment herein. It was further adjudged that the plaintiffs should recover of the defendants Beck their costs of the action.

Upon the trial, the court found, among other things, these facts, viz.: That defendant William H. Beck is a son of Louis P. Beck, and on the 3d of January, 1889, the father was indebted to the son to the extent of nearly $5,000. The father was the owner of a stock of goods in a store and of the fixtures therein, and on the above-mentioned day he conveyed them all to his son by a bill of sale. The consideration for the execution of such bill was an agreement of the son to take the goods described in it as payment of the debt due him and his assumption of certain indebtedness of the father, which he agreed to pay, and the payment of a small amount in cash to the father. The son was entirely solvent and able to pay the debts which he assumed. There was no question but that the consideration for the bill of sale fully equalled the value of the goods and fixtures which passed under it.

At the time of the execution of the bill of sale, the son had not the slightest knowledge that the father intended to make a general assignment for the benefit of creditors. Weinberg, the assignee, received certain notes from the father, but at that time did not know that he contemplated making an assignment, and the assignee was at all times ignorant of any fraudulent intent on the part of the father.

The assignment for the benefit of creditors was made by Louis P. Beck to the defendant Weinberg on the 4th day of January, 1889, in the afternoon, and the assignee duly accepted the trust and executed a bond for the faithful discharge of his duties, and the first knowledge William H. Beck had of the making of the assignment was on the morning of the 5th of January, 1889, when he was informed of the fact by the assignee.

At the time of the making of the bill of sale, the defendant

Statement of case.

William H. Beck knew that Louis P. Beck was insolvent. The findings of the court in relation to the intent of the father, which accompanied the execution of the bill of sale and the assignment, are particularly set forth in the opinion.

There is no finding that Louis P. Beck executed the bill of sale in contemplation of making an assignment for the benefit of his creditors.

Other facts are set forth in the opinion.

George F. Danforth for appellants. The court erred in its construction of the statute relating to general assignments. (Laws of 1877, chap. 466; Laws of 1887, chap. 503; *United States* v. *McClennan*, 3 Sumn. 346; *Coates* v. *Donnell*, 94 N. Y. 178; *Williams* v. *Whedon*, 109 id. 337; *Bank* v. *Williams*, 38 N. Y. S. R. 836; U. S. R. S. § 5128; Laws of 1801, chap. 131; Laws of 1811, chaps. 123, 248; Laws of 1812, chaps. 8, 14; 2 R. S. art. 3, § 24; Laws of 1867, chap. 860; Laws of 1870, chap. 92; Laws of 1874, chap. 600; Laws of 1884, chap. 328; Laws of 1886, chap. 283; *Varnum* v. *Hart*, 119 N. Y. 105; *Fitzgerald* v. *Terann*, 109 id. 441; *Dean* v. *M. E. R. Co.*, 119 id. 547; *Ireland* v. *Rathbone*, 39 id. 369; *R. W. Co.* v. *Fielding*, 101 id. 504; *Brown* v. *Guthrie*, 110 id. 435.) The learned court couples the assignment and the bill of sale together, and says each is a part of one transaction and an evasion of the statute in relation to assignments. This is erroneous. (*Edwards* v. *Hall*, 6 DeG., M. & G. 89; *Alexander* v. *Brame*, 7 id. 539; *Jeffries* v. *Alexander*, 8 H. L. Cas. 646; *United States* v. *McLennan*, 3 Sumn. 345; *Lampson* v. *Arnold*, 19 Iowa, 479; *Van Patten* v. *Burr*, 52 id. 518.) The judgment sets aside the sale and the assignment as an evasion or fraud upon the statute. The statute simply reduces the preferences and then distributes the estate according to the directions of the assignor in his assignment. No other consequences can follow. (*Rex* v. *Birmingham*, 8 B. H. 29; *White* v. *Cotzhausen*, 129 U. S. 329.) The action will not lie in favor of the plaintiffs as judgment creditors. (*Spring* v. *Short*, 90 N. Y. 538; *Lidenburgh* v. *Herdtfelder*, 103 id.

304; *Crown* v. *Frothingham*, 97 id. 105.) The words of a statute are to be taken in their natural and ordinary signification, and read according to the obvious import of the language without resorting to subtle and forced interpretation for the purpose of either limiting or extending their operation. (Witherford on Statutes, 54; *U. S.* v. *McClennan*, 3 Sumn. 346; *Bouchard* v. *Dias*, 1 N. Y. 201; *Weber* v. *Mick*, 131 Ill. 520; *Schroeder* v. *Walsh*, 120 id. 403.) The case of *Berger* v. *Varrelmann* (127 N. Y. 281) does not require a different construction in this case than that sanctioned by the very words of the statute. (U. S. R. S. §§ 5021, 5110; Code Civ. Pro. § 2173; *Starin* v. *Kelly*, 88 N. Y. 418; *Zoeller* v. *Riley*, 100 id. 108; 2 R. S. 137, § 5.) The judgment appealed from was given and has been sustained so far, upon the erroneous ground that the transaction of sale by John P. Beck to William Beck was an evasion of the statute. (*Smale* v. *Burr*, L. R. [8 C. P.] 64; *Ramsden* v. *Lupton*, L. R. [9 Q. B.] 17; *Jeffries* v. *Alexander*, 8 H. L. Cas. 646; *Tiemeyer* v. *Turnquish*, 85 N. Y. 522; *Knapp* v. *McGowan*, 96 id. 86, 87.)

Edward F. Wellington for respondents. The attempt on the part of the defendants to dispose of substantially the whole estate of Louis P. Beck among creditors whom he wished to prefer in the distribution of his assets, so that the illegal preferences would not abate, as provided for in chapter 503 of the Laws of 1887, was a fraud upon the statute, and a fraud upon these plaintiffs whom they sought by indirection and management to deprive of its protection. (*Manning* v. *Beck*, 54 Hun, 102; 35 N. Y. S. R. 978; *Berger* v. *Varrelman*, 38 id. 813; *White* v. *Cotzhausen*, 129 U. S. 302; *Spellman* v. *Freedman*, 54 Hun, 410; *Davis* v. *Harrington*, 8 N. Y. Supp. 218; *Wilcox* v. *Payne*, Id. 407; *I. W. Co.* v. *Payne*, 11 id. 408.) The assignment and bill of sale must be construed as one instrument and transaction. (*Loos* v. *Wilkinson*, 110 N. Y. 195, 209; *Sweetzer* v. *Smith*, 20 N. Y. S. R. 62; *Southard* v. *Benner*, 72 N. Y. 424, 427; *Berger* v. *Varrelmann*, 38 N. Y. S. R. 813; *F. N. Bank* v. *Bard*, 13 N. Y. Supp. 691.)

Opinion of the Court, per PECKHAM, J.

The bill of sale cannot stand upon the sole ground that William was a purchaser for value. (*Union Bank* v. *Warner*, 12 Hun, 306–308; *Wood* v. *Hunt*, 38 Barb. 302; *Briggs* v. *Merrill*, 58 id. 400; *Fullerton* v. *Vail*, 42 How. Pr. 294; *Jewett* v. *Noteware*, 30 Hun, 194; *Billings* v. *Billings*, 31 id. 67.)

PECKHAM, J. By chapter 503 of the laws of this state, passed in 1887, it was enacted that "In all general assignments of the estates of debtors for the benefit of creditors hereafter made, any preference created therein ——— shall not be valid except to the amount of one-third in value of the assigned estate left after deducting ——— the costs and expenses of executing such trust; and should one-third of the assets of the assignor be insufficient to pay in full the preferred claims to which, under the provisions of this section, the same are applicable, then the said assets shall be applied to the payment of the same *pro rata* to the amount of said preferred claims."

The provisions of this act have been under review in the second division of this court in the case of *Berger* v. *Varrelmann* (127 N. Y. 281), and whatever has been therein decided we regard as conclusive upon us to the same extent as if decided by us. That action was brought by judgment creditors of the assignor, to set aside a judgment entered against them by confession as in fraud of an assignment by them executed immediately after the confession of such judgment, and to recover for the benefit of the estate of the assignors the amount realized on the sale under the judgment. The ground of the action was that the judgment was confessed by the judgment debtors in contemplation of the subsequent assignment made by them and for the purpose of creating a preference by such judgment for more than the amount permitted by the statute.

It was held that the provisions of the act were not confined to preferences in the assignment itself, but that they applied to those created by a separate instrument in contemplation of the assignment, including all the instrumentalities which the insolvent debtor, in contemplation of such general assignment,

voluntarily employed to give a preference. But a question arose in the case whether the act applied as against a judgment creditor by confession, who had no knowledge that the debtor confessing the judgment intended to follow it with an assignment.

The learned chief judge in the course of the opinion considered (not decided) the case upon the theory that the creditor had no knowledge when he took his confession of judgment that the debtor contemplated making a general assignment, and said that he thought it might well be decided upon that theory, but because some of his brethern thought, in the absence of a finding of fact that the creditor had this knowledge, the judgment by confession should not be set aside, but allowed to stand as a valid preference to the extent of one-third of the estate of the assignors, he proceeded to discuss the question of knowledge by the creditor, and from the whole evidence he came to the conclusion that the creditor had such knowledge, and that the court was required, under the rule as to implying facts, to infer in support of the judgment under review that the creditor knew when he took his confession of judgment and made his levy that the judgment debtor then contemplated making a general assignment.

A majority of the court agreed in this view, and the judgment by confession was set aside. Some of the members, however, thought that the fact of knowledge could not be implied, and, as it had not been found, they dissented from the views of the majority.

This case is, therefore, authority for holding that when the creditor has knowledge that the judgment is confessed by the debtor in contemplation of his assignment for the benefit of creditors, the judgment under the facts set forth in the case will be regarded as in violation of the statute.

The case under discussion here does not come within the authority of that just cited. A careful examination of some additional facts found by the learned court herein is necessary in order to determine precisely what is the status of the case before us. By the fifty-first finding the court found that the

bill of sale and the assignment to Weinberg were one transaction and were both made for the purpose and with the intent on the part of the vendor and assignor to cheat, hinder and defraud his creditors, and to divide his property among creditors whom he wished to prefer in violation of the laws of the state of New York forbidding the creation of preferences in any assignment to an extent greater than the assets of the person making such assignment, and for the purpose of evading such statute and cheating and defrauding his said other creditors.

By the fifty-second finding the court found that the vendee William H. Beck had, at the time of the making of the bill of sale, actual knowledge of the intent of the vendor and assignor (his father) to cheat, hinder, delay and defraud his creditors.

By the fifty-third finding the court found that the two Becks, father and son, at the time when the bill of sale was executed and for a long time prior thereto, had connived and conspired together to cheat and defraud the creditors of the father and to dispose of all his property of any value among his friends whom he wished to prefer, in violation of the laws of the state of New York prohibiting any preferences beyond the amount of one-third of the assets of the person making the general assignment.

In the first of these three findings the intention of the vendor and assignor Beck is alone spoken of. The finding in substance is that it was his intention to cheat some of his creditors by dividing his property among other creditors whom he wished to prefer, in violation of the laws of New York, and by evading those laws. The court finds that this intention of the elder Beck, the son William H. Beck had actual knowledge of at the time of the making of the bill of sale.

It is not claimed that the first above-mentioned finding was intended to refer to these instruments as having been executed with the intent to hinder, delay or defraud creditors under those sections of the statute relating to fraudulent conveyances. (2 R. S. 137, §§ 1–8.) The learned counsel for the plaintiffs cites the findings for the sole purpose of sustaining his claim

that the bill of sale and assignment were set aside because upon their face they were a fraud upon the statute relating to preferences in general assignments.

The exact extent of the knowledge imputed to the son by the second of these findings is rendered somewhat plainer by referring to the sixteenth and one hundred and first findings of fact made by the court upon the request of the defendants.

Those findings are respectively (1) that at the time of the purchase by the son from the father through this bill of sale, the son did not know that the father intended making a general assignment for the benefit of his creditors; (2) that the son first learned of the assignment made by his father to Weinberg, the day after it was made, when he was told of it by the assignee.

So far as the son is concerned, taking into consideration his ignorance of the existence of any intention on the part of his father to thereafter make an assignment, all the knowledge that can be imputed to him by the fifty-second finding is that he knew of his father's intention to execute the bill of sale and that it would operate as a preference to those creditors benefiting by it. Of any intention on the part of the father to hinder and defraud creditors by making an assignment upon the heels of the bill of sale, the son is by the express finding of the court entirely acquitted. The court in order to characterize the intent of the father, connects the execution of the bill of sale on one day, with the execution of the assignment on a subsequent day and calls them one transaction, and then finds that both were made for the purpose of hindering and defrauding the creditors of the father by dividing his property in a manner not permitted by the statute.

These findings show the fact that a preference was intentionally given to the son and others by the execution of the bill of sale by the insolvent father, and unless that fact constituted a violation of the statute as to preferences, there is no finding that the son was aware of any intent on the part of the father to violate that statute.

It is claimed that the fifty-third finding is a finding of actual

fraud and conspiracy separated from the bill of sale and assignment, and in which fraud they were the culminating acts.

Bearing in mind the ignorance of the son as to any intent on the part of the father to make an assignment, and the result of the finding is that the father meant to pay or secure some of his creditors by making this bill of sale, and the son conspired with the father to that end, the effect of which the court says would be to prefer some of the creditors to a greater amount than one-third of the property of the vendor, and this connivance and action the court characterizes as a conspiracy to cheat and defraud creditors and a violation of the laws of New York in regard to preferences. There was no conspiracy to execute this bill of sale and to thereafter make an assignment, for the court finds the son was ignorant of an intent by the father to execute such an instrument, and indeed it fails to find even that the father had such intention when the bill of sale was made.

Of course a mere conspiracy to cheat and defraud amounts to nothing (*Brackett* v. *Griswold*, 112 N. Y. 454), and if an intent to defraud creditors is only proved by the doing of perfectly lawful acts, the mere fact that such acts are charged as being done pursuant to a conspiracy, is immaterial. The finding of the court of an intent to cheat and defraud creditors is based upon the finding of a conspiracy to dispose of all the father's property among his friends in violation of this statute, and the alleged intent to illegally dispose of the property or to violate the statute, is based, so far as the son is concerned, upon the fact of the execution of the bill of sale by the father, with the knowledge and connivance of the son, the result of which was to give a preference to the son and those other creditors whose debts were to be paid by the son. If this were an illegal act, where the son was in ignorance of any intent on the part of the father to thereafter execute a general assignment, then such act might be characterized as one which did hinder, delay and defraud creditors; otherwise not.

My examination of these findings of fact has been quite minute because of the claim made by the learned counsel for

the plaintiffs that there was a substantial finding of fraud under the statutes relating to fraudulent conveyances, irrespective of any alleged fraud arising from an intentional evasion or attempt at evasion of the act of 1887, but I cannot see that any such construction can be fairly placed upon what has been found by the trial court. A reference to the opinions of the court makes the matter still more clear, as it there appears that the case was decided upon the theory that the bill of sale and the assignment must be construed together, and although there was a cunningly devised scheme to accomplish by indirection what he was prohibited by statute from doing directly, the vendor and assignor must be held to have failed in such purpose.

The question is, therefore, now fairly before us, whether a creditor who procures a bill of sale from an insolvent debtor in payment of or as security for an honest and subsisting debt, and in ignorance of any intention on the part of the debtor to make thereafter a general assignment, can hold it as against the world, even though the property passing under the bill of sale exceed one-third of the assets of the vendor. If the preference were contained in the general assignment itself, we have no trouble in concluding that it would be unlawful if in excess of the one-third of the assets of the assignor, entirely irrespective of the question whether the creditor was ignorant of the preference when the assignment was made, or whether he was ignorant of the intention of the assignor to make such assignment. In that case the assignor attempts to do in the very instrument itself that which the statute says he shall not do in such an instrument. The inhibition of the statute is not limited to the condition that the creditor shall be in ignorance of the preference. Such preference shall not be made, says the statute, and if made, it shall be void for the excess over one-third the assets. If the creditor attempt to take the preference, he does it by virtue of the very instrument which the statute says shall not give it, or if it do give it, that it shall be void for the excess. There is no room for argument in such case; but it is an entirely different matter where a preference is given by reason of an instrument which the

debtor ordinarily has full power to execute and deliver for the very purpose of thereby giving a preference, and which a creditor has like full power to receive for the purpose of thereby receiving such preference. In such case it seems to me an important consideration to inquire whether at the time the security was taken or the debt paid the creditor knew the debtor was insolvent and intended to follow the bill of sale by an assignment for the benefit of his creditors and to thus divest himself of all control over his property. If he had such knowledge it would be entirely proper, as was held by the second division, to regard the confession of judgment as one of the instrumentalities employed by the debtor in contemplation of making an assignment for the purpose of giving a preference in violation of the act. Whether it should be regarded as one of such instrumentalities ought, as it seems to us, to depend somewhat upon the state of mind of the creditor. If he had knowledge that the debtor intended to make an assignment and that the security was given with the intent that it should result in consequence of the assignment in a violation of the provisions of the act, then we think the security should be adjudged ineffectual. In such case the creditor in effect participates with the debtor in an attempt to violate the act; but even then how far the judgment should go is worthy of some inquiry when the question shall arise. Whether it should set aside the whole security or leave it to fare with the rest under the assignment to the extent of one-third of the debtor's assets in accordance with the act, we do not now determine.

It is said that the statute is aimed at the debtor and his action alone, and that it does not affect the creditor, and hence if the debtor make an illegal preference and thus violate the statute, the intent or knowledge of the creditor is immaterial, and the preference in excess of the amount permitted by the statute must be disregarded. This may well be true when the preference which the debtor makes is contained in the very instrument described in the statute. Any preference the debtor therein makes which runs counter to the statute,

must be treated as the statute directs, and the intent of the assignor in giving the preference is wholly immaterial. But the statute does not and was not intended to prevent a creditor from obtaining payment of or a security, and thereby a preference for his debt, even from an insolvent debtor, and where a court is asked to set aside a security which is disconnected from and prior to any general assignment, on the ground that it is in violation of the act in relation to preferences in general assignments, it at once becomes a question whether that act was ever intended to cover a case where the creditor, obtaining or availing himself of such securities, was ignorant of any existing intention on the part of the debtor to thereafter perform an entirely separate act and make a general assignment. It does not, in terms, cover such a case, and we think it should not be thus extended by construction.

In *White* v. *Cotzhausen* (129 U. S. 329) it appeared that it was the intention of the debtor by the means he adopted, to give to his mother and relatives, and it was their intention to obtain a preference over all other creditors, and what was done was in execution of a scheme for the appropriation of the estate by the debtor's family to the exclusion of the other creditors, thereby avoiding a general assignment. In that case the Supreme Court was administering the law of Illinois, and the learned judge, in the course of his opinion, said that where an insolvent debtor recognizes the fact that he can no longer go on in business and determines to yield the dominion of his entire estate, and in execution of that purpose, or with intent to evade the statute, transfers all, or substantially all, his property to a part of his creditors in order to provide for them in preference to other creditors, the instrument or instruments by which transfers are made, and that result is reached, whatever their form, will be held to operate as an assignment, the benefits of which may be claimed by any creditor not so preferred who will take appropriate steps in a court of equity to enforce the equality contemplated by the statute. Such, said the judge, we think is the necessary result of the decisions in the highest court of Illinois.

he act there under consideration was a statute of Illinois ıibiting the preference in an assignment of any debt or lity over another and declaring such preference void.

aking the facts into consideration as shown in that case, a scheme entered into by all the family, debtor and cred-, to give and to obtain a preference over all other creditors by means of such scheme to appropriate the entire estate ıch debtor to his own family and to the exclusion of all r creditors, it possibly might not be a great strain upon the ıte to hold such a scheme void. But we have no such case. ead of a scheme shared in by the creditors to appropriate perty in evasion of the statute, there is entire ignorance n the part of the creditor of any such scheme and there is fact that the creditor is only doing an act which has always etofore been entirely legal, viz., obtaining security for and bably thereby a preference in the payment of his debt from nsolvent debtor.

n the case in the Supreme Court it is recognized that the ıte of Illinois does not contravene the general rule that a tor when financially embarrassed, may in good faith com-nise his liabilities, sell or transfer property in payment of ts, or mortgage or pledge it as security for debts, or create n upon it by means of a judgment confessed in favor of creditor. But all these acts which might otherwise be valid which a creditor would have the right to avail himself of, to be declared void if the debtor has at that time recog-d the fact that he can no longer go on in his business. Our ıte does not, in terms, cover such a case and differs also n the Illinois statute, which declares void all preferences. ; does not seem to us that either the letter or the spirit of statute covers a case where the creditor is ignorant of any nded violation of the statute by the debtor, and where the of the creditor is simply to obtain security for the pay-ıt of an honest debt due from the debtor to himself.

We are disposed to agree with the Supreme Court of Penn-ania as the doctrine of that court is announced in *Lake re Banking Co.* v. *Fuller* (110 Penn. St. 156), where the

court says: "Nor can we agree that a mere intent of the debtor, unexpressed to the creditor, to give him a preference by paying or securing the debt, although he at the time contemplated and soon after executed a general assignment, operated to defeat such preference on the ground that it is contrary to the act of 1843. Such an intent is not unlawful and cannot be inferred from a proper act. But even if it were, the creditor who has a perfect right to accept payment or security of his debt, *and has not participated in the alleged unlawful intent*, should not be compelled to forfeit his preference in that amount. He at least is innocent and may in good conscience hold the advantage he has obtained."

It has been urged that by this construction the statute may be easily evaded. It is said a failing debtor may prefer his favorite creditors by separate instruments and then make a general assignment, and as a result his favored creditors will be paid in full and those provided for in the assignment will get nothing. Those creditors, however, who participated in or were cognizant of the intent of the debtor, could not avail themselves of their securities beyond, at any rate, the statutory rate (*Berger* v. *Varrelmann*, above referred to), and as to those creditors who were ignorant of any such intent it is not perceived that any great misfortune would attend the allowance of their securities in the same way as has been legal for a long number of years past. The debtor might also neglect to make an assignment and then it would look as if the acts of preference would be legal. The statute of 1887 at any rate does not cover such a state of facts and we do not feel at liberty to enlarge its provisions by construction so as to bring such facts within the condemnation of the statute. If it be thought good policy so to do, the legislature, and not this court, is the body to which application should be made to effect such change in the law.

There are many other facts testified to before the trial court, and not herein alluded to, which the counsel for plaintiffs claims are evidence of actual fraud on the part of the defendants herein, within the statute relative to fraudulent conveyances.

ndings of the court, as we have seen, go upon the ground he intent of the debtor to violate the statute of 1887 was d, and hence a hindrance and delay to creditors. The fraud has not been found and we do not feel like dis- of this case upon a fact not found or passed upon by urt below, while repudiating the real ground upon which dgment was founded. The actual fraud claimed by the el for the plaintiffs may be proved on the new trial and nd as a fact by the court or jury, will dispose of the case or of plaintiffs.

think the judgment should be reversed and a new trial d, with costs to abide the event.

concur, except Earl, J., not voting.

lgment reversed.

LA Jooss, Appellant, *v.* Christian Fey et al., Respondents. 133-312-132-74 129 17 156 436

ied woman may take and hold real property as a joint tenant with husband, and where by a deed to herself and her husband it appears ly that the intent was to convey to her not merely as a wife, but ately, by virtue of her individual right, as joint tenant with him, as the right to dispose of her interest independent of her husband. premises were, in 1882, purchased by F. and his wife, each con- ting to the purchase-money from his and her separate estate. The s of the grant were to "the parties of the second part as joint tenants to their heirs and assigns," and the habendum clause was to them joint tenants and not as tenants in common." The wife subsequently eyed her interest in the premises to plaintiff. In an action for a tion thereof, *held*, that the wife took and held as joint tenant with husband, not as tenant by the entirety, that she had power to con- and by her deed plaintiff acquired her interest (§ 3, chap. 200, Laws 48, as amended by chap. 875, Laws of 1849); and that the action maintainable. (Code Civ. Pro. § 1582.)

v. *Nunan* (92 N. Y. 152), distinguished.

ued October 8, 1891; decided December 1, 1891.)

PEAL from judgment of the General Term of the City of Brooklyn entered upon an order made February 24,

Statement of case.

1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This was an action of partition.

The defendants Christian Fey and Louise Fey are husband and wife, and in 1882, they bought the premises described in the complaint, each contributing to the purchase-money from his and her own property. The words of grant were to them "the parties of the second part as joint tenants and to their heirs and assigns forever," and the habendum clause was to them "as joint tenants and not as tenants in common." Subsequently Louise, the wife, conveyed her interest in the premises to the plaintiff. The court below, at Trial and at General Terms, held that the action could not be maintained, on the ground that the defendants had acquired and held the premises as tenants by the entirety, and the wife could not convey as she did.

James C. Church for respondents. The fact that the habendum clause of the deed contained the statement that the grantees took as joint tenants and not as tenants in common was insufficient to so vest the title in them, as under the common law they take as tenants by the entireties. (4 Wait's Act. & Def. 170; *Torrey* v. *Torrey*, 14 N. Y. 430; *Rogers* v. *Johnson*, 5 Johns. Ch. 430; *Nash* v. *Mitchell*, 71 N. Y. 199; *Bertles* v. *Nunan*, 92 id. 161; *Zorntlein* v. *Bram*, 100 id. 12; *Fitzgerald* v. *Quann*, 109 id. 445.)

H. C. Conrady for appellant. All natural persons may be joint tenants with each other, and husband and wife may hold as joint tenants and tenants in common. (Tiedeman on Real Prop. 163, § 264; 4 Waite's Act. & Def. 170; 2 Kent's Comm. 132; 4 id. 363; *Moore* v. *Moore*, 47 N. Y. 467; 1 Washb. on Real Prop. [3d ed.] 579; 2 Bl. Comm. 182; Preston on Estates, 132; 2 Preston on Abstracts, 41; *Hicks* v. *Cochran*, 4 Edw. Ch. 107; *McDermott* v. *French*, 15 N. J. Eq. 78; *Cloos* v. *Cloos*, 55 Hun, 450; 24 Abb. [N. C.] 219.) It was the intention of the grantor and grantees that the latter should acquire and become seized of the property

conveyed as joint tenants, and this they had a right to do, although they held the relation to one another of husband and wife. (Laws of 1848, chap. 200, § 3; Laws of 1849, chap. 375.) Joint tenants may maintain partition. (Code Civ. Pro. § 1532; 1 Washb. on Real Prop. 457.) It is claimed in this case that in consequence of the fact that the defendants are husband and wife, they, therefore, took title to the said property under the common-law rule, as tenants by the entirety. This is not tenable. (Laws of 1849, chap. 375; Laws of 1848, chap. 200, § 3; Stewart on Husband & Wife, § 310; Laws of 1880, chap. 472; *Zorntlein* v. *Bram*, 100 N. Y. 12.) A joint tenant may sell his share and the tenancy then becomes a tenancy in common. (Tiedeman on Real Prop. 158, § 238.) The habendum clause in the deed to defendants should be construed in accordance with the intent of the parties. (2 R. S. 748, § 2.)

Gray, J. Prior to the passage of the various acts by the legislature of this state for the benefit of married women (in the years 1848, 1849, 1860 and 1862), the common-law rule obtained that by a conveyance to husband and wife, they could only take and hold the estate as tenants by the entirety. It was immaterial to affect the quality of their holding, whether the estate was given to them, or acquired by their joint purchase. Words of grant which, to separate persons, would convey in joint tenancy, to husband and wife would convey by entireties. They could not take and hold otherwise. They were seized each of the whole, and neither could sell without the consent of the other. (Williams on Real Property, 208; 2 Kent's Com. 110, 132; *Jackson* v. *Stevens*, 16 Johns. 113, 115.) This estate of tenancy by the entirety has but one feature in common with that of a joint tenancy, and that is in the right of survivorship. In all other essential respects they differ. The estate which vests by virtue of a grant jointly to husband and wife is peculiarly the result, or product of the marriage relation, and depends for its continuance upon the unity of man and wife.

Lately, at our October term, we had occasion, in *Steltz* v.

Schreck (128 N. Y. 263), to consider the effect upon this tenancy by the entirety of the severance of the marriage relation by a divorce, and we held that husband and wife then held as tenants in common. This result, it was considered, flowed logically from the peculiar cause for the tenancy by the entirety. It depended upon the continuance of the marriage relation, and ceased with its cessation.

When the Married Women's Acts were passed, the effect was to relieve them from various disabilities, under which they were at common law, and to qualify them, to the extent specified in the acts, to act as unmarried women might with respect to their separate estates, and to vest them with the same capacity for the acquisition of a separate property as though they were unmarried women. The disabilities were not wholly removed, but only to the extent that the statutes, by their plain reading, must be taken to have changed the common law as affecting the legal status of married women. By section 3 of chapter 200 of the Laws of 1848, as amended by chapter 375 of the Laws of 1849, it was provided that "any married female may take by inheritance, or by gift, grant, devise or bequest, from any other person than her husband and hold to her sole and separate use, and convey and devise real and personal property, or any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if unmarried, etc."

The subsequent legislation of 1860 (Chap. 90) and 1862 (Chap. 172) provided that all property owned by, coming to, or acquired by a married woman as her separate property "shall, notwithstanding her marriage, be and remain her sole and separate property * * * and shall not be subject to the interference or control of her husband, or liable for his debts," and that she may sell and convey such property as if she were unmarried. In *Meeker* v. *Wright* (76 N. Y. 262), it was considered by the learned judge, who delivered the opinion in that case, that this legislation had abrogated the common-law rule governing a conveyance to husband and wife. But in that view a majority of the judges did not concur and the

appeal was decided upon another point. When, lat
case of *Bertles* v. *Nunan* (92 N. Y. 152), it became
to consider the effect of the changes wrought by the
of this state in the status of the married woman a
law, the majority of the court concurred with Judg
his opinion that whatever the effect of a conveyance t
and wife was prior to 1848, it so remained thereafte
considered that the provisions of the legislative acts
of married women did not define what estate the hu
wife shall take in lands conveyed to them jointly, an
legislature did not contemplate the abrogation of
mon-law unity.

"The common-law incidents of marriage," it was
"are swept away only by express enactments." The
so fully discussed and the authorities and legislation
erally reviewed by Judge Earl, as to relieve us from th
of repetition. Whatever was the previous drift of the
in this and in other courts, the case of *Bertles* v. *N*
be held as firmly establishing the proposition that th
law rule as to the unity of the husband and wife ha
abrogated by the legislation of this state, with respe
tenancy of real property when conveyed to them
such a description. Those expressions of the learn
in his opinion in that case, which speak of the wife'
receive conveyances, or of their force and effect in
the estate granted, have reference to the case of
made to the wife in connection with her husband, a
not be read as importing otherwise in the constructi
statutes. Nothing in that decision holds against th
the married woman's capacity, to hold real property
tenant with her husband, provided that it is the plai
the deed of conveyance, as expressed in the words
If it appears plainly that she takes, not merely as
but separately, by virtue of her individual right, the
would come within the express words of the enabli
ments of 1848 and 1849, which conferred the capa
the married woman to acquire by grant or otherwis

these acts a husband and wife may be made joint tenants, or tenants in common, where the intention is made plain by express words. This must be so, if we would give to them meaning and force. The disabilities of the woman, which were the consequences of her coverture at common law, were incompatible with modern notions and with that recognition of her natural rights, which a changed condition of things in the world compelled, and the legislation of the state, commencing with the year 1848, was the outcome of such forces of thought.

The unity of husband and wife, caused by the marriage relation, continued to subsist, notwithstanding legislation, for it had not expressly abrogated that rule of the common law. The utmost it had done was in express enactments to confer especial capacities and powers upon the married woman, among which were the power to take property as though she were unmarried and the power to dispose of it as such. Legislation had almost entirely relieved her of her common-law disabilities, but the rule of strictness in the construction of statutes changing the common law forbids extending the effect of an act beyond what is required to give it a reasonable and proper effect. *Bertles* v. *Nunan* did not deny a full operation to the legislative enactments; it simply applied this rule of construction and confined the operation to what the language of the acts clearly imported, and as they did not in terms withdraw the married female wholly from her status under the law, as it existed prior to the Revised Statutes, nor defined the kind of estate which would vest in her by a grant jointly to her and her husband, the prior rule of the common law remained in force and qualified the interest of each as a tenancy by the entirety; where, by virtue of their union of person, each was seized as of the whole estate, with the right of survivorship and without the right of independent alienation. But in the case before us the operation of the common-law rule was obviated by the intention of the grantor as shown by the express words of the grant, and the case was brought within the purview of the enabling acts and so the wife took and

Statement of case.

held as joint tenant with her husband. This interest therefore, alienable by her and was acquired by the pla through her conveyance to him. That acquisition entitlec under the Code (§ 1532) to bring the action for a partiti

For the reasons given, I think the judgments of the Sp and of the General Terms should be reversed and a new ordered, with costs in all the courts to abide the event o trial.

All concur.

Judgments reversed.

MARIA MULOCK *v.* JAMES A. BYRNES, Respondent, FANN BYRNES, as Assignee, etc., Appellant.

A judgment recovered on an indebtedness incurred by defendant b of his failure to pay over rents collected by him as agent is barr his discharge in bankruptcy. The cause of action in such a case a debt created by defendant "while acting in a fiduciary capa within the meaning of the provision of the Bankrupt Act, declarin such a debt shall not be discharged by bankruptcy proceedings. R. S. § 5117.)

It seems **said provision does not apply to cases of implied, but o those technical trusts which are actually and expressly constitut the parties.**

(Argued October 9, 1891; decided December 1, 1891.)

APPEAL by Fannie J. Byrnes, as assignee of the judg rendered in this action, from order of the General Ter the Supreme Court in the first judicial department,' January 16, 1891, which affirmed an order of the Sp Term granting a perpetual stay of proceedings.

The nature of the proceeding and the facts, so f material, are stated in the opinion.

A. C. Fransioli for appellant. The alleged dischar bankruptcy granted to the respondent does not bar the a lant's claim. (U. S. R. S. § 5117; Blumenstiel on I ruptcy, 540, 541; *Argall* v. *Jacobs*, 87 N. Y. 110; *Cla Bowling*, 3 id. 216; *Monroe* v. *Upton*, 50 id. 593; *Tal*

Harris, 93 id. 567; *McDonald* v. *Davis*, 105 id. 508; *Faguan* v. *Knox*, 8 J. & S. 41.) The question as to the character of the original debt should not be tried in this summary proceeding upon affidavits. (*Monroe* v. *Upton*, 50 N. Y. 593; *Schuman* v. *Stross*, 52 id. 404; Blumenstiel on Bankruptcy, 553.)

Sam'l J. Crooks for respondent. The order was justified from the facts and warranted by the practice in like cases. (*Monroe* v. *Upton*, 50 N. Y. 593.) The fact that the whole or a part of the consideration for the note was moneys collected by the bankrupt for Fannie J. Byrnes, as her agent, does not present a case of a debt created by fraud, or while acting in a fiduciary character, within the meaning of the section exempting such a debt from the operation of the discharge. (*Lawrence* v. *Harrington*, 15 N. Y. S. R. 867; *Hennequin* v. *Clews*, 77 N. Y. 427.) The appellant, as assignee of the judgment, cannot attack the regularity of the proceedings leading to the discharge to which her assignor was a party, collaterally, nor can she assert any element existing in the judgment debt, not asserted prior to and shown by the judgment, to impeach the operation of the discharge. As to the character of the debt the judgment is conclusive, and the previous cause of action, whatever it was, became merged in the judgment. (20 Abb. [N. C.] 218–220.) Delay in the prosecution of the proceedings leading to the discharge could not be imputed to prevent its operation or use. (*Palmer* v. *Hussey*, 87 N. Y. 303; *McDonald* v. *Davis*, 105 id. 508.)

RUGER, Ch. J. The defendant, upon showing a discharge from his debts made August 25, 1890, in proceedings in bankruptcy commenced in 1878, moved for a perpetual stay of proceedings against Fannie J. Byrnes, as assignee, from collecting a judgment rendered against him on August 8, 1877, in the Supreme Court of this state in favor of Maria Mulock. The judgment purported to have been rendered in an action commenced in September, 1873, upon a promissory note for $2,500, executed by the defendant June 1, 1870, and payable to the order of Fannie J. Byrnes one year after date,

erest. This note, soon after its delivery
Mrs. Mulock, and she recovered jud
879, Mrs. Mulock assigned the judgment
nd she, as assignee thereof, opposed the
at the note upon which such judgme
s given to her by the defendant upon an
o have been incurred by the defendant
ciary character, as an agent in the collecti
June, 1870.

pposition to the motion was based upon
evised Statutes of the United States, pro
t created by the fraud or embezzlement
by his defalcation as a public officer, or
ciary character, shall be discharged by pr
cy; but the debt may be proved and
shall be a payment on account of such de
st question that presents itself on this st
er the creditor has shown the case of a d
efendant while acting in a fiduciary chara
ning of the Bankrupt Law. The credit
d to show that the relation of principal
etween her and her husband, and that he
ner agent, and she argues from that fact
a fiduciary character in transacting such
been frequently held in cases of controllin
anguage of the Bankrupt Law does not a
ed trusts; but only to those technical trus
and expressly constituted by the parties.
th, 2 How. [U. S.] 202; *Neal* v. *Clar*
man v. *Cotting*, 104 Mass. 245; *Hennequ*
. 427; *Palmer* v. *Hussey*, 87 id. 303.)
held in the *Chapman* case, under the Ba
that a factor who receives the goods of an
it proceeds, was not acting in a fiduciar
within the meaning of that act. Justice McLEAN
the opinion of the court, saying: "The cases enum
defalcation of a public officer,' 'executor,' 'ad

'guardian,' 'trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts and not those which the law implies from the contract."

In *Neal* v. *Clark*, the court adopted the same construction and applied it to the act of 1867.

It was held in *Hennequin* v. *Clews* (77 N. Y. 427), that the Bankrupt Law of 1867, although differing somewhat in language from that of 1841, was not changed in meaning and was subject to the same construction, and the definition given to the words "fiduciary character" in that act by the *Chapman* case were adopted and applied in construing the similar provision in the act of 1867. Judge CHURCH, in writing the opinion in that case, adopts the language of Justice MCLEAN and says the same view has been taken in the cases of *Cronan* v. *Cotting* (104 Mass. 245), *Grover* v. *Clinton* (8 Natl. Bk. Reg. 312), *Owsley* v. *Cobin* (15 id. 489), *In re Smith* (8 id. 401.)

Judge FINCH said in *Palmer* v. *Hussey* (87 N. Y. 307), that: "It is settled in this court, in supposed accordance with the doctrine of the federal courts, that the 'fiduciary capacity' intended by the Bankrupt Act, relates to technical trusts, not merely such as the law implies from the contract, but actual and expressly constituted," citing *Hennequin* v. *Clews*; and further, that the evidence and the affidavits in the case under consideration "show no other or different trust or fiduciary relation than such as may be said always to exist in a case of agency. In every such case there is an element of trust and confidence, so that a breach of duty may be said to be a breach of trust, but the agent is, nevertheless, not a fiduciary within the meaning of the Bankrupt Act."

There are other questions involved in the case, which we think are fatal to the appeal, but the point considered is so clearly settled by authority that it is unnecessary to spend time in further discussion.

The order should be affirmed, with costs.

All concur.

Order affirmed.

Statement of case.

LAUREN C. WOODRUFF, Respondent, *v.* THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY et al., Appellants.

In the disposition of a trust estate, the trust fund must bear the expenses of its administration, and this, although no provision therefor is made in the instrument of trust.

Trustees and, *it seems*, others acting in a fiduciary character, are entitled to reasonable allowances for costs and expenses incurred in the course of the performance of their duties, out of a fund which has been secured or protected by their efforts. This right includes all reasonable fees paid attorneys and counsel for services in litigations successfully prosecuted for the benefit of the fund.

So also, when one of many persons having a common interest in a trust fund, at his own expense, takes proper proceedings to secure it, or save it from destruction and restore it to the purposes of the trust, he is entitled to an allowance for his services and to reimbursement out of the fund from those who accept the benefit of his efforts.

The Supreme Court has authority over such a fund, with power to make distribution and to grant allowances to the one by whose efforts it has been secured or preserved.

Where the amount and value of such expenses and services have been determined by the court below upon contradictory evidence, this court has no power to review its conclusions.

Plaintiff was one of three trustees appointed by and under a mortgage given by a railroad company to secure certain of its bonds. Said company subsequently executed a lease of its road to plaintiff for the unexpired term of its charter on consideration that he should, among other things, pay the interest upon said bonds and the principal at maturity. This liability plaintiff assumed without any consideration or prospect of personal benefit, but solely in the interest and for the protection of the bondholders, and with the understanding that he should transfer it on the same terms to the E. R. Co.; he, in pursuance of this understanding, leased the road to that company, it agreeing to make the payments and perform the covenants in the lease to plaintiff. The E. R. Co. entered into possession, and after performing its covenants and paying the interest on the bonds for several years, defaulted, became insolvent and its assets went into the hands of a receiver. An action to foreclose said mortgage was brought by said trustees against the mortgagor, plaintiff individually, and the successors of the E. R. Co., which resulted in a judgment for a sale and for a deficiency against the mortgagor and plaintiff. Plaintiff commenced and carried on a series of litigations in his individual name against the E. R. Co., its receiver and others, to

Statement of case.

compel payment to the bondholders of the unpaid interest. These litigations resulted in the collection of a fund, which was deposited in a bank to the credit of the trustees. In a proceeding to obtain certain allowances for plaintiff's services and expenses in prosecuting said litigations, *held*, that in so doing, plaintiff was performing a trust duty and was entitled to an allowance for his necessary costs and expenses and to a compensation for his services, at the rate usually awarded to executors and administrators.

Lent v. *Howard* (89 N. Y. 169), distinguished.

(Argued October 5, 1891; decided December 1, 1891.)

APPEAL from order of the General Term of the Superior Court of the city of Buffalo, made July 14, 1891, which affirmed an order of Special Term directing the allowance and payment of certain sums of money to plaintiff out of a fund collected in the action and on deposit.

The nature of the proceedings and the facts, so far as material, are stated in the opinion.

John G. Milburn for appellants. The court had no power to make the allowance in question. (*McLean* v. *Freeman*, 70 N. Y. 89; *Atty.-Genl.* v. *N. A. L. Ins. Co.*, 91 id. 57; Perry on Trusts, §§ 894, 910; *Sturges* v. *Stewart*, 31 Vt. 54; *Hollister* v. *Stewart*, 111 N. Y. 644; Jones on Corporate Bonds, etc., §§ 287, 289, 291.) If the plaintiff was entitled to an allowance as a trustee the lump allowance of $2,529.26, which is five per cent on the entire recovery, is error in the absence of an agreement to that effect, as only the commissions allowed executors could be awarded. (*Meacham* v. *Sternes*, 9 Paige, 398; *In re Schell*, 53 N. Y. 263; *Downing* v. *Marshall*, 37 id. 380.) The allowance of interest upon the disbursements was improper. (Perry on Trusts, § 910.)

Edward C. Randall for appellant. Woodruff was not in the prosecution of this lawsuit a trustee for anybody. (*Woodruff* v. *Erie R. Co.*, 93 N. Y. 613; 122 id. 197; 7 N. Y. S. R. 814; *In re Atty.-Genl.* v. *Ins. Co.*, 91 N. Y. 61; *Savage* v. *Sherman*, 87 id. 285.) The amount the court below could have allowed Woodruff would have been about

.e commission of an executor or guardian. (*Phœnix* ix, 28 Hun, 629; *In re Moffat*, 24 id. 325.) The s not warranted in allowing his alleged disbursements eason that there was no proper evidence, (1) that they er made; (2) that they were proper and necessary. *Parklin*, 10 Daly, 122; Code Civ. Pro. § 2734; *Good- P Brien*, 25 N. Y. S. R. 204.)

M. H. Peck for respondent. The question as to whether any allowance should be made, and if any, what the amount of such allowances should be, was purely a question of discretion with the court below. That discretion has been exercised and in the same direction by each court below and is not now the subject of review by this court. (*Dowling* v. *Clift*, 101 N. Y. 673; *Schwinger* v. *Raymond*, 105 id. 648; *Shiels* v. *Waterman*, 37 N. Y. S. R. 134.) The court below had power to make the allowance granted by the order appealed from under the circumstances. (*Woodruff* v. *E. R. Co.*, 25 Hun, 246; *Downing* v. *Marshall*, 37 N. Y. 280; *In re Atty.-Genl.* v. *N. A. L. Ins. Co.*, 91 id. 57; 2 Perry on Trusts [3d ed.] § 910; *R. & S. R. R. Co.* v. *Miller*, 57 Vt. 146; *Ex parte Plitt*, 2 Wall. 453; *White* v. *Pearer*, 7 Hare, 278; *Thompson* v. *Calhan*, 2 Coll. 90; *Rogers* v. *Ross*, 4 Johns. Ch. 608.) As to the allowance made by the court below to Lucius N. Bangs as counsel, he is not affected by any of the questions raised against Woodruff. (*Ex parte Plitt*, 2 Wall. 479.) All the controversy by these appellants as to the amount of Woodruff's allowance for money disbursed has passed the point of discussion. The court below with power to do so has fixed that fact and that matter is adjudicated. (2 Perry on Trusts [3d ed.] § 911; *Lent* v. *Howard*, 89 N. Y. 169.)

RUGER, Ch. J. The object of this proceeding was to obtain certain allowances out of a fund in court for the plaintiff's services and expenses in prosecuting certain litigations resulting in the creation of such fund. The fund was procured by the prosecution of the lessees of the Erie and Genesee Valley Railroad upon a covenant in its lease whereby they were obli-

gated to pay the amount of certain bonds at maturity and the annual interest thereon to the holders, secured by a mortgage upon such road executed to the plaintiff and two others as trustees for their benefit.

Both parties are here asking for the distribution of this fund by the court, if it has the power to order distribution. We think there is no doubt as to the authority of the court over the fund. For the purposes of this discussion, the plaintiff may be regarded as the sole trustee under the mortgage, inasmuch as one of such trustees had died before any litigation ensued, and the other took no active part in administering the trust. The bondholders, who were permitted by the court to litigate the question, opposed the granting of any allowances from the fund. The Special Term ordered such allowances to be made, and the General Term affirmed the order.

The evidence tended to show that the plaintiff had incurred large liabilities, made large expenditures and performed valuable services in the prosecution of the several actions which produced the fund in dispute, and was industriously engaged for the period of nearly thirteen years in pushing them to a successful conclusion.

The amount and value of such expenses and services have been fixed by the courts below upon contradictory evidence, and we are not, therefore, at liberty to review their conclusions upon the facts. The sum allowed was quite large, amounting to about twenty-five per cent of the sum recovered, but it must be borne in mind that, without the action of the plaintiff, there would have been no fund to distribute, and that for a long period of time, without assistance from the beneficiaries of the fund, and against an energetic and untiring opposition, he resolutely prosecuted the actions which resulted in recovering the sum of upwards of fifty thousand dollars, now lying on deposit in the Metropolitan Trust Company of New York, to the credit of the trustees and subject to the order of the court.

It is a cardinal principle in the disposition of trust estates, that the trust fund shall bear the expenses of its administration, and that one who successfully conducts a litigation *in autre*

the benefit of a fund, shall be protected in the distribution of such fund for the expenses necessarily incurred by him in the performance of his duty. (*In re Holden*, 126 N. Y. 589; *Trustees* v. *Greenough*, 105 U. S. 527.)

It is laid down as an elementary rule in Perry on Trusts, that "trustees have an inherent equitable right to be reimbursed all expenses which they reasonably incur in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. If a person undertakes an office for another in relation to property, he has a natural right to be reimbursed all the money necessarily expended in the performance of the duty. (Lewin on Trusts, p. 557; Perry on Trusts, § 910.)

This right is extended, not only to necessary traveling expenses, but to all reasonable fees paid for legal advice in the discharge of his duties, and in most of the states includes compensation for time, labor and trouble. (Perry on Trusts, §§ 910, 917, 918.)

It was held in *Wetmore* v. *Parker* (52 N. Y. 450), that this court has decided in two cases (*Downing* v. *Marshall* and *DeCourval* v. *Ray*, 37 N. Y. 380) that the Special Term has power to make allowances to trustees and others acting in a fiduciary capacity, for all expenses necessarily incurred in the faithful performance of their duties, including counsel fees. In *Downing* v. *Marshall* (*supra*) the court said "that persons acting *en autre droit*, as executors, administrators, trustees, guardians, receivers, etc., are, upon a faithful execution of their trusts, to be indemnified out of the trust property for all expenses necessarily incurred in the faithful performance of their duties."

There can be no reasonable doubt but that the general rule is that trustees and others acting in a fiduciary capacity are entitled to reasonable allowances for costs and expenses incurred in the course of the performance of their duties, out of a fund which has been secured or protected by their efforts.

It is claimed, however, that the plaintiff was not a trustee for the bondholders and in securing the fund in question, was not acting for the bondholders, but was engaged in protecting

his own personal interest. We do not think that this claim is supported by the facts of this case.

The proof shows that the plaintiff and two other persons were appointed trustees under a mortgage made by the Erie and Genesee Valley Railroad Company in 1871, to secure bonds to the extent of one hundred and twenty thousand dollars, issued and negotiated for the purpose of obtaining money for the construction of its railroad. It does not appear that the plaintiff had any other interest in such railroad than as trustee under such mortgage, until the circumstances, hereinafter related, took place, which gave him a certain interest therein. On November 1, 1871, the railroad company executed a lease of the road to him for the unexpired term of its charter, upon the consideration that he should, among other things, pay the annual interest accruing on said bonds and also the principal sum of said bonds at the maturity thereof. It was further provided in the lease that upon the payment of such bonds by the said plaintiff, *or the Erie Railway Company*, the annual rent of such railway should be reduced to one dollar and taxes. On the 8th day of November thereafter, the plaintiff executed a lease of the railroad to the Erie Railway Company, upon the agreement of that company, that it should make the payments and perform the covenants agreed to be made and performed by him, and thereupon the Erie Railway Company entered into the possession of such railroad and performed the covenants made by it, and paid the interest on such bonds until the year 1874, when it defaulted in such payment.

This default continued for four years, and no effort seems to have been made by anyone, except the plaintiff, to compel the performance by the Erie Railway Company of its obligations. In the meanwhile that company had become insolvent and its property went into the hands of a receiver. At this time the bondholders of the Genesee Valley Railroad had the security, not only of the original mortgage, but also the covenants of the plaintiff and the Erie Railway Company to pay the principal and interest of their claims. In 1877 an action to foreclose such mortgage was begun by the trustees against the mort-

gagors, L. C. Woodruff, individually, and the successors to the Erie Railway Company. This action was defended by the successors of the Erie Railway Company and resulted, after many years of litigation, in a judgment for the sale of the property mortgaged and the recovery of the deficiencies against the mortgagors and Woodruff. The sale resulted in a deficiency. In 1877 Woodruff commenced an action in the Supreme Court in his individual name against the Erie Railway Company, H. J. Jewett, its receiver, and a number of other individuals and corporations, to compel the payment by them, to the holders of the bonds, of the unpaid installments of interest on these railroad bonds.

This action was predicated upon the plaintiff's equitable right to compel the parties primarily liable, to make such payment for the protection of their surety. The action resulted in 1885, after a long and harassing litigation, in a judgment fixing the payment of such interest upon the receiver of the Erie Railway Company. In the meanwhile, the property of the Erie Railway Company had passed out of its hands, and those of its receiver into the possession of the New York, Lake Erie and Western Railroad Company, and a further action became necessary to reach the funds applicable to the payment of the judgment recovered, in the hands of the latter company. Woodruff had become insolvent in 1884; but in 1886, he commenced another action in his individual name against the New York, Lake Erie and Western Railroad Company to subject the property in its hands received from the Erie Railway Company and its receiver to the payment of the judgment theretofore recovered, against the receiver of the Erie Railway Company. This action resulted in a judgment on January 11, 1890, under which the fund involved in this proceeding was eventually placed in bank to the credit of the trustees of the mortgage.

If the action above referred to had been prosecuted in the name of Mr. Woodruff as trustee, there could have been no question made but that he would have been entitled to an allowance for his costs, counsel fees and expenses in prosecuting such action; but, because he was individually liable for

the payment of such interest coupons and prosecuted such actions individually, it is claimed that he was not in a strict sense a trustee, or acting in a fiduciary capacity, and is not, therefore, entitled to the allowances usually made in such cases.

We are of the opinion that this view of the character in which Mr. Woodruff acted in prosecuting such actions is too narrow and technical to be supported in a court of equity. While Mr. Woodruff might, by virtue of the covenant in his lease, have been liable to pay the annual interest on the coupon bonds, it seems to have been a liability voluntarily assumed by him for the benefit of the bondholders alone. It was contemplated by both the Erie and Genesee Valley Railroad Companies, and the plaintiff when he took the lease of their road, that he should transfer it on the same terms assumed by him to the Erie Railway Company, who were to become primarily liable for the payment of the bonded debt and the interest thereon. For some purpose, which is not disclosed, it was thought best that the lease should pass through him; but it is uncontradicted that he assumed this liability without any consideration or the prospect of any personal benefit, in the interest of and for the protection of the bondholders. Whether, as the trustee of such bondholders, he thought it his duty to promote their interests by securing to them the payment of their bonds and interest by a large railroad corporation like the Erie Railway Company, we do not know; but that he voluntarily stepped into the position that made him liable, for the purpose of providing an apparently responsible corporation as the paymaster of their bonds, is evident from the whole case. That he was not working to protect his individual interest in prosecuting the actions referred to is also apparent from the fact that when the General Term of the Supreme Court in 1882 adjudged that the lease to him was *ultra vires* and void and thus apparently released him from all liability for the payment of rent, he still continued the prosecution of that action and obtained the decision of this court reversing that judgment and holding that such lease was valid, and thus re-established his own liability thereunder.

It further appears that in 1884, and long before the litigation resulting in the creation of the fund ended, Mr. Woodruff had become insolvent and the question whether he was liable upon his lease to pay rent or not must have become a matter of comparative indifference to him. The last action resulting in the payment of the money composing the fund, was commenced in 1887, long after he became insolvent.

Neither do we think because the actions were commenced in the name of Woodruff individually, instead of as trustee, that it was necessarily shown that he was not acting as a trustee in prosecuting them. It is unquestionable that, as such trustee, he was under an obligation to protect the fund in his hands from waste and destruction and secure the annual income therefrom for the benefit of the bondholders. In pursuance of his duty in this respect, after default in the payment of interest, he prosecuted the foreclosure of the mortgage, but this remedy being likely to prove inadequate he also commenced the action against the receiver to recover the rentals of the railroad property due from him. It was probably within the power of the bondholders also to maintain actions against the Erie Railway Company and its receiver for this money, but they, in fact, made no effort to do so, and it would evidently be inconvenient and expensive on account of the large number of bondholders interested, the difficulty of securing united action on their part, the necessity of a large number of separate actions and the doubtful nature of the remedy, to pursue that course. If there was any other remedy in the power of the trustee to pursue and protect the interests of those who were the beneficiaries of the fund in his charge, it was his duty to use it. Fortunately the remedy was in the trustee's power to commence an action which would produce the same result as would have followed actions by the bondholders. That action he did commence and asked, as the relief to be granted, that the amount of such rents should be paid into his hands as trustee for the bondholders, by the Erie Railway Company. Does it lie in the mouths of these bondholders, who accept the benefit of his action, to say that he

was not acting in that respect as their trustee because he was personally liable for the payment of such rentals?

As we have seen, Woodruff was insolvent for the larger part of the time that this litigation was going on and could have been moved in a very small degree by motives of self interest. We think that in the proceeding to bring this fund into the possession of the trustees for the benefit of the bondholders he was performing a trust duty, aud is entitled to the benefit of the rule which protects trustees while engaged in the performance of such duties. We think that this case comes within the meaning and spirit of the decision in the case of *Trustees* v. *Greenough* (*supra*). In that case one Vose was the holder of a large amount of the bonds of the Florida Railroad Company, and upon allegations that the fund provided for the payment of such bonds, was being dissipated and squandered through the dishonesty and incapacity of the trustees and others having its administration in charge, brought an action in his own name for his own benefit and that of other holders of such bonds. After a long and expensive litigation the action resulted in the recovery and preservation of a large part of the fund and the accumulation of a large sum of money in the hands of the court for distribution. Vose claimed that he should be allowed for the costs, expenses and counsel fees incurred and expended by him and services rendered in the prosecution of such action. It was claimed that Vose was not before the court in the character of a trustee and was not, therefore, entitled to reimbursement of his expenses. It was said by Judge BRADLEY, in delivering the opinion of the court, that "if the complainant is not a trustee he has, at least, acted the part of a trustee in relation to the common interest. He may be said to have saved the fund for the *cestui que trust* and to have secured its proper application to their use." He further says: "It is a general principle that a trust estate must bear the expenses of its administration. It is also established by sufficient authority that where one of many parties, having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruc

ıd to restore it to the purposes of the trust, he is entitled nbursement, either out of the fund itself or by propor- contribution from those who accept the benefit of his ."

hin the doctrine of this case we think that the plaintiff ıtitled to recover the necessary costs and expenses which s put to in securing the fund in question.

lifferent question, however, arises as to the plaintiff's for compensation for his services. It was held in *Lent ward* (89 N. Y. 169), that "the principle is, that for the al services of an executor or trustee in the discharge of orial duties, or those which pertain to his trust, the com- ns allowed by law are deemed to be a full equivalent;" that case the executor had carried on and managed a r of large farms for agricultural purposes for a series of and the court held that such services were not included in ty as an executor, and it, therefore, sanctioned an allow- or his compensation for such services. (See, also, *Green- Case, supra.*)

think the trustee in this case should have been allowed nsation for his services at the rate usually awarded to ors and administrators. Inasmuch as the sum in the of the trustee for distribution is found by the court and nmissions thereon can be accurately computed, we do not t is necessary to have a rehearing of the case for the pur- f settling the allowances. The percentage allowed to ors and administrators on the sum received here, would t to $695.85, and the allowance of such a sum is in ance with the rule recently adopted as to the compen- of persons acting in a fiduciary capacity.

order appealed from is, therefore, modified by deducting the item allowed for personal services, the sum of .41 and, as modified, affirmed without cost to either in this court.

concur, except EARL, PECKHAM and O'BRIEN, JJ., ting.

gment accordingly.

Statement of case.

129-619.

GEORGE MUNRO, Respondent, *v.* FRANK TOUSEY, Appellant.

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It seems, that an imitation of the names, signs or marks under which another conducts a business is a deception practiced upon the public and an injury to the proprietor in the loss of custom and patronage, to redress which the jurisdiction of a court of equity may be invoked.

This rule applies to the publication of books under a particular name; this is the subject of property, and a colorable imitation of the name adopted by one publisher by another engaged in publishing similar books, by which the public may be easily misled into supposing it is the literary article they desired to obtain and read, is an act of deception which injures the publisher who first adopted the name, and which he may call upon a court of equity to redress.

This power, however, is only to be exercised to prevent fraud and imposition, and to justify the interference of the court there must be some real resemblance in the name and appearance of the publication, such as to deceive a person of ordinary intelligence and prevent him in the ordinary and natural use of his senses from ascertaining the difference.

Plaintiff was the publisher of a series of detective stories; to designate the series, he had adopted the name of the "Old Sleuth Library," and "Old Sleuth, the Detective," was designated as their author. Defendant published a series of similar stories which he named the "New York Detective Library." This series contained publications by titles, some of which contained the words "Young Sleuth," others "Sleuth." There was a marked difference in the illustrations upon the covers of the two series. *Held*, that an action was not maintainable to restrain defendant from so using the word "Sleuth" in connection with his publication; that the pseudonym "Old Sleuth" was plaintiff's property; but he had no such property rights in the word "Sleuth" as would justify the interference of the court in preventing its use by defendant, in the absence of proof of similarity in the publications, or of other facts tending to show an intent on his part to mislead purchasers.

(Argued October 13, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made October 6, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Opinion of the Court, per GRAY, J.

William H. Townley for appellant. To entitle one to an injunction, there must be such a similarity of designation on the part of defendant as would be likely to mislead purchasers. (Browne on Trade-marks, § 547; *Snowden* v. *Noah*, Hopk. Ch. 396; *Bell* v. *Lock*, 8 Paige, 74; *Talcott* v. *Moore*, 6 Hun, 106; *Hier* v. *Abrahams*, 82 N. Y. 519.) *Laches* on the part of the plaintiff is clearly shown in this case. (*Caswell* v. *Davis*, 58 N. Y. 223; *Amoskeag Co.* v. *Garner*, 55 Barb. 151; Browne on Trade-marks, §§ 497, 503–505, 547.)

Roger Foster for respondent. Plaintiff was entitled to the injunction granted. (*A. F. P. M. Co.* v. *C. S. Co.*, 35 Fed. Rep. 396; *C. M. Co.* v. *C. M. Co.*, 32 id. 94; *A. G. P. Co.* v. *G. P. Co.*, 25 Hun, 398; *Mack* v. *Petter*, L. R. [14 Eq. Div.] 431; *Guinness* v. *Ullmer*, 10 L. T. 127; *Dickens* v. *Lee*, 8 Jurist. 183.) The delay in beginning the suit did not deprive plaintiff of the right to an injunction and an accounting. (*N. Y. R. Co.* v. *Rothery*, 107 N. Y. 310; *Platt* v. *Platt*, 58 id. 646; Code Civ. Pro. § 388; *Derby* v. *Yale*, 13 Hun, 273; *Hogg* v. *Scott*, L. R. [8 Eq. Div.] 444; *Taylor* v. *Carpenter*, 3 Story, 458; *A. M. Co.* v. *Spear*, 2 Sandf. 599.) Tousey's insolvency and the fact that he is now working upon a salary cannot relieve him from responsibility. (*Estes* v. *Worthington*, 30 Fed. Rep. 465, 466; *Sawyer* v. *Kellogg*, 9 id. 601; *Jennings* v. *Doland*, 29 id. 861; *Maltby* v. *Bobo*, 14 Blatch. 53; *Steiger* v. *Heidelberger*, 4 Fed. Rep. 455; *Cox* v. *Hickman*, 8 H. L. Cas. 268.) The principles adopted upon the accounting were correct. (*Benkert* v. *Feder*, 34 Fed. Rep. 534.)

GRAY, J. The plaintiff was the publisher of a series of pamphlet works of fiction, entitled as the "Old Sleuth Library," and in this action he has sought to restrain the defendant, who was the publisher in a like way of the "New York Detective Library," from publishing and selling any book or pamphlet containing in its title, or in any part of it, the word "Sleuth," or purporting to be by the author of any story with any such title, and to compel an accounting for all profits realized.

The defendant's publications, which are especially aimed at by name in this action, were variously entitled as "Young Sleuth, the Detective, in Chicago," or as "Young Sleuth, the Keen Detective," or as "The Broken Button, or Young Sleuth on the Trail," and by other titles which contained the words "Young Sleuth," or "Sleuth."

The foundation for plaintiff's claim to an exclusive right to the use of the word, or name, "Sleuth," in any application of it to the title or authorship of a work of fiction, seems to consist in his having selected and made use of the name "Old Sleuth Library" to designate a series of pamphlet publications of detective stories. Previously, he had published a story called "Old Sleuth, the Detective," which proved so unusually attractive to some portion of the reading public as to cause the plaintiff to start an "Old Sleuth Library" series, and to suggest to his author that in his future contributions of detective romances to that library he should describe their authorship as being by "Old Sleuth." The plaintiff now contends that "Sleuth," as a word or name, has become his property and a trade-mark, which designates, as he puts it, "a certain kind and quality of goods, namely, books describing the detection of crimes, manufactured and sold by him," and his counsel argues that the plaintiff's title to such a trade-mark is conclusively established by the findings in the case. But, with respect to this argument of ownership, it is sufficient to say that we may not so read the findings of the learned trial judge. What he does find is that the pseudonym "Old Sleuth" was the plaintiff's property and was used by him to identify his publications. There may have been some evidence to warrant such a finding, and, in the view I take of this case, it may be assumed that it was the fact. The question, then, which we have actually presented is whether, by the appropriation and use of the name "Old Sleuth," to designate his serial publications of detective stories, the plaintiff has acquired a property right in the word "Sleuth," which the law will protect against the use of by others in entitling works of fiction. I think we cannot agree with the court below in such a view. There is no proof

to support a finding of an intention on the part of the defendant to defraud the plaintiff, or the public, except as it may be inferred by the court from the mere use of the name "Sleuth," and, as to any similarity in the pamphlet publications, in covers or pictorial illustrations, by which a purchaser might be misled, nothing in the evidence, or in a personal inspection of the exhibits, would warrant the finding that it existed. The differences, in the titles of the series in which the stories appear, and in the illustrations upon the covers, are marked.

That the plaintiff would be entitled to the protection of the law against the use by others of the words "Old Sleuth Library," as used to describe a series of publications, or against the use of the name "Old Sleuth, the Detective" for a work of fiction, may be conceded. That is plainly right and, in order to afford a protection more adequate than would be afforded by an action at law, the equity power of the courts might be successfully invoked to restrain a similar use by others of such names and to prevent a species of literary piracy. This power is exerted upon the same principle upon which the court acts in trade-mark cases, in restraining the unauthorized use of the label, or sign, constituting the trade-mark. The theory upon which a court of equity has long acted is that a resemblance in, or an imitation of the names, signs, or marks, under which another conducts a business, is a deception practiced upon the public and an injury to the proprietor, in the loss of custom and patronage; to redress which an action at law for damages is not a sufficiently satisfactory remedy. That is the principle we may extract from the often cited opinions of Lord ELDON in *Hogg* v. *Kirby* (8 Vesey, 215); of Lord LANGDALE in *Knott* v. *Morgan* (2 Keen, 213), and of our own chancellors, in the early cases of *Snowden* v. *Noah* (Hopkin's Ch. 347) and of *Bell* v. *Locke* (8 Paige, 75). A publication is the subject of property and there is no reason why, like every other kind of property, it should not be the subject of the law's protection. To put out a colorable imitation of it, by which the public may be easily misled into supposing that it is the literary article they

had in mind to obtain and read, is an act of deception, which injures the publisher.

In *Snowden* v. *Noah* (*supra*), Chancellor WALWORTH said of the injury to the right of a publisher of books by acts of deception and piracy, that, like that which is done to the good will of an established trade, or to the custom of an inn, "the injury, for which redress is given in such cases, results from the imposture practiced upon the customers of an existing establishment or upon the public." So that, if there was such a simulation of the plaintiff's publications for the fraudulent purpose of imposing upon the reading public, a court of equity would protect him against the continuance of such encroachment upon his rights. But the difficulty in the way of the plaintiff's case is that there is no such resemblance between the defendant's publications and those of the plaintiff, as to prevent the ordinary and natural use of one's senses in ascertaining the difference before buying. And unless that actually exists, in a similarity in their caption and appearance, there is no just reason for the interference of equity.

The difference in the caption of the story, as well as the difference in the name of the series and in the illustration upon the covers, should indicate to the most ordinary intelligence that the defendant's publications were not of tales of "Old Sleuth the Detective," or parts of the "Old Sleuth Library." No admirer of that hero of fiction, and a follower of those serial publications, could be misled, when buying numbers of the defendant's "New York Detective Library," containing tales of "Young Sleuth, the Detective, in Chicago," or of "Phœbe Paullin's Fate, or Tracked by Young Sleuth," or any others of those named. If the character and prowess of Old Sleuth have captivated the literary fancy of a portion of the public and a magic in the name secures the public patronage to the "Old Sleuth Library," how can it be imposed upon by the caption of stories of "Young Sleuth," or of "The Broken Button, or Young Sleuth on the Trail?" And the illustrations of Young Sleuth and of his rescued subjects convey no idea of Old Sleuth. Both to the eye and to the ear the differ-

ences are marked. The youth of the detective hero in the defendant's tales, as indicated in the title, sufficiently warns an intending purchaser that the original Old Sleuth is not the subject of the author's imagination. If he deems Mr. Munro's "Old Sleuth Library" more reliable, as a depository of exciting detective tales, why or how should he select from Mr. Tousey's "New York Detective Library?" However attractive the captions of the tales published by Mr. Tousey, neither they, nor the illustrations designed to fasten the public eye, can fairly be said so to resemble the plaintiff's series or titles as to amount to an imposture upon the reading public.

That is what the question is here; as it is in every case where it is sought to restrain the prosecution of a business charged with being an encroachment upon the complainant's property rights. A court of equity should proceed in the exercise of its power with a wise and judicial discretion. In cases such as this it should presume that the public makes use of the senses of sight and hearing, and that it is possessed of a sufficient amount of intelligence to note the difference the senses convey. The court ought not to interfere with the freedom of conduct of trade and with general business competition. Its power to restrain should be reserved to prevent fraud and imposture from some real resemblance in the name and appearance of the publications.

I think the judgments of the Special and General Terms should be reversed and, as a new trial would be useless, judgment should be ordered for the defendant dismissing the complaint, with costs in all the courts.

All concur, except RUGER, Ch. J., not voting.

Judgment accordingly.

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ELIZABETH BLAZY, Respondent, *v.* HECTOR MCLEAN, Appellant.

B., plaintiff's husband, and one W., entered into a contract with defendant for the purchase of a farm by them of him for $5,092.52, "and other stipulations and payments heretofore made and to be performed;" these were not set forth. Indorsed upon the contract, however, was an agreement by the vendees to pay defendant in addition to said sum, $2,000, and interest, "secured in part" by a deed from B. and wife of certain lots belonging to her, said $2,000 to be paid to McL. prior to the execution of a deed by him to his vendees, and on a sale by McL. of the lots conveyed, the avails, after paying expenses, were to be applied on said $2,000. McL. subsequently conveyed the farm to the wife of W. for a new consideration agreed upon between them, and without the knowledge or consent of B. or his wife. In an action to compel defendant to reconvey said lots to plaintiff, and to pay her the rents received, *held*, that the deed from B. and wife was given as collateral security, and so, was in effect a mortgage, and as it appeared that the debt it was given to secure no longer existed, plaintiff, in the absence of other proof, was entitled to the relief sought.

Defendant alleged in his answer and offered to prove on the trial that the deed of the lots was in fact delivered by plaintiff and accepted by him as an absolute payment of the $2,000. This was objected to and excluded upon the ground that the written contract was conclusive. *Held*, error; that the rule invoked was not applicable as between one of the parties to the contract and a stranger.

(Argued October 15, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

This action was brought to compel defendant to reconvey to defendant certain premises in the city of Rochester and to recover the value of the use and the rental value thereof from January 24, 1878, the date when defendant took possession of the same.

The facts, so far as material, are stated in the opinion.

Cassius C. Davy for appellant. The two written instruments must be read and construed as one contract. (*Marsh*

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v. *Dodge*, 66 N. Y. 533; *Whittlesey* v. *Delaney*, 73 id. 571.) The deed given by plaintiff to defendant was a payment *pro tanto* upon the contract. (3 Pars. on Cont. [7th ed.] 294, 295; Thomas on Mort. § 60; *Ware* v. *Westfall*, 21 Barb. 177; *Thomas* v. *Barton*, 48 N. Y. 193; *Hazeltine* v. *Moore*, 21 Hun, 355.) The notice given by Blazy to defendant of his refusal to perform the contract, followed by his abandonment of the farm, forfeited his rights in the contract, and plaintiff's rights in the city lots followed the forfeiture by Blazy, her husband. Unless he is in position to demand repayment of any money he paid upon the contract, she is not in position to demand a reconveyance of the city lots. (*Havens* v. *Patterson*, 43 N. Y. 218; *Chapin* v. *Power*, 7 Paige, 145.) No tender of a deed to Blazy was necessary, after his notice of refusal to perform the contract. (*Wright* v. *Moore*, 21 Wend. 230; *Lawrence* v. *Miller*, 86 N. Y. 131, 137; *Johnson* v. *Blydenburgh*, 31 id. 247; *Graves* v. *White* 87 id. 463--465.) After default of the vendee the deed should, therefore, be governed by the same rules that would obtain if it had been a partial payment, so far as any cancellation of it is concerned. (*Havens* v. *Patterson*, 43 N. Y. 218; *Page* v. *McDonnell*, 55 id. 299; *Lawrence* v. *Miller*, 86 id. 131.) Plaintiff cannot complain. The city lots were accepted by defendant at their full value. (*Lobdell* v. *Lobdell*, 36 N. Y. 337.) Plaintiff is estopped from recovering back the premises until she or the other parties to the contract have repaid to defendant the amount for which the premises were pledged. (Willard's Eq. Juris. 429–432, 446; Boone on Mortgages, § 301.) Fraud, and collusion which is fraud also, are to be proven, not presumed. (1 Story's Eq. Juris. § 190; *Morris* v. *Talcott*, 96 N. Y. 100; *Haskins* v. *Kelly*, 1 Abb. Pr. 63; Boone on Mortgages, § 302.) The action being based on fraud and tried upon that theory, recovery cannot be had upon other grounds. (*Ross* v. *Mather*, 51 N. Y. 108; *McMichael* v. *Kilmer*, 76 id. 36.) When a recovery is sought on the ground of fraud, the party alleging the fraud must act promptly on its discovery. (*St. John* v. *Youmans*, 13 Wkly. Dig. 354; *Bruce* v. *Daven-*

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port, 5 Abb. [N. S.] 185, 190; *People* v. *Stephens*, 71 N. Y. 527, 559; *Cobb* v. *Hatfield*, 46 id. 533; *Hay* v. *S. F. Ins. Co.*, 77 id. 235; *Platt* v. *Platt*, 58 id. 646.) The parties cannot be restored to their original position. (*Bradley* v. *Bosley*, 1 Barb. Ch. 125.) There are no findings to support the first conclusion of law "that defendant should execute, acknowledge and deliver to the plaintiff a good and sufficient deed to reconvey to said plaintiff the said lots 29 and 30, on the north side of Weeger street in the city of Rochester, described in the complaint, with a covenant of warranty against his own acts." (*Stoddard* v. *Whiting*, 46 N. Y. 627; *Oberlander* v. *Spies*, 45 id. 175.) Defendant was not allowed to show either the conversations between defendant and plaintiff in reference to the execution of the deed or the conversations between her and her husband and White, by which she was induced to execute it. This was erroneous. (*Wheeler* v. *Billings*, 38 N. Y. 263; *Platner* v. *Platner*, 78 id. 90; *Hutchins* v. *Hebbard*, 34 id. 24; *Juilliard* v. *Chaffee*, 92 id. 529; *L. M. Co.* v. *S. Ins. Co.*, 88 id. 591; *Coleman* v. *N. Bank*, 53 id. 388; *Dempsey* v. *Kipp*, 61 id. 463; *Van Brunt* v. *Daly*, 81 id. 251; *Routledge* v. *W. Co.*, 119 id. 592; *Barker* v. *Bradley*, 42 id. 316; *Rider* v. *Pomell*, 26 id. 310.) It was important to show what plaintiff's husband said at the time he notified defendant of his abandonment of the contract and all that he did or said at this time was material and relevant. (*Proctor* v. *Thompson*, 15 Abb. [N. C.] 340; *Graves* v. *White*, 87 N. Y. 463; *Walsh* v. *Gossler*, 89 id. 542.)

E. W. Gardner for respondent. Even if John Blazy, one of the parties to the land contract, had been the owner of this Weeger street property, and had conveyed it to defendant as an absolute payment for $2,000 on this land contract, or made payments in cash, and the contract was afterwards rescinded and canceled by the mutual consent of the parties, without a specific release by Blazy, he could compel a reconveyance by defendant to him or a repayment to him of the money paid

tract. (*Graves* v. *White*, 87 N. Y. 463; *Thrasher* 2 T. & C. 309; 59 N. Y. 649; 1 Abb. [N. C.] 39, 45; *tuart*, 30 Barb. 20; *Battle* v. *R. C. Bank*, 3 N. Y. v. *Zinsser*, 76 id. 549; *Gillett* v. *Maynard*, 5 Johns. b. [N. C.] 45; *Morange* v. *Morris*, 3 Keyes, 49; *Morgan*, 77 N. Y. 318; *Lawrence* v. *Taylor*, 5 *Raymond* v. *Barnard*, 12 Johns. 274; *Fuller* v. Hun, 600.) In equity cases, even the receipt of evidence is not sufficient to reverse a judgment. It d that the court in deciding the case disregards the evidence. (*McSorley* v. *Hughes*, 58 Hun, 360; *Clark*, 120 N. Y. 642.)

I. The deed of the plaintiff and her husband to the McLean was declared by the judgment below to in truth a collateral security. The property which belonged to the plaintiff in her own right, and the delivered by her husband apparently in accordance erms of a written contract. John Blazy, the hus- Augustus C. White, as parties of the second part, had with McLean, as party of the first part, for the by them of a farm. That contract recited a consid- five thousand and ninety-two dollars and fifty-two th other stipulations and payments heretofore made performed." and was signed by the vendor and ven- at those other stipulations and payments were the oes not recite; but indorsed upon it appears the fol- morandum, signed by all the parties: "In addition hin payments of $5,092$\frac{52}{100}$, we the parties of the rt agree to pay to the party of the first part two lollars, with semi-annual interest on the same from he 1st day of January, 1878, said $2,000 and interest *red in part* by a deed executed by Elizabeth Blazy Blazy on lots Nos. 29 and 30 on the north side of reet in the city of Rochester, and said $2,000 to be e party of the first part prior to the execution of a e parties of the second part; and on the sale of said

Opinion of the Court, per FINCH, J.

lots by said McLean the avails of said sale, after paying all expenses, are to be applied on the $2,000 aforesaid, this being a part of the original agreement."

By the terms of this memorandum, two thousand dollars was added to the purchase-price, and that sum was declared to be "secured in part" by Mrs. Blazy's deed. The two lots were not to be taken in payment of the two thousand dollars, but to become security for that payment "in part." If the transfer was absolute there was no need of the additional memorandum, or, if made, the price of the lots should have been credited at once.

This contract was dated January 23, 1878, and the deed was delivered by the husband the next day. There is no ambiguity in this writing. Blazy and White agreed to pay McLean $2,000 before the delivery of his deed, and Mrs. Blazy gave her deed as collateral security for their debt. It was, therefore, in substance and effect, a mortgage. The evidence further shows that the debt which it was intended to secure no longer exists. McLean has conveyed the farm to Mrs. White for a new consideration agreed upon between them, and without the knowledge or consent of Blazy or his wife. Of course he cannot now claim that the debt of two thousand dollars remains, and that he is entitled to hold the Rochester lots as collateral security.

But he takes a different position. He claims in his answer that he took the deed of Mrs. Blazy as payment in full for the $2,000; that Blazy, as vendee, abandoned the contract and forfeited the payment, and the vendor, accepting that abandonment, delivered up the contract as canceled and annulled and resold the premises to Mrs. White. It is evident that this theory cannot stand upon the face of the written contract. That shows that McLean did not take the lots at $2,000 and agree to credit that sum on the contract; and that he took them as security only in part, and if he sold them was to credit merely what he received. There was thus no error in the finding of fact that the deed was given as collateral security, upon the facts permitted to be proven. The debt having been

extinguished a reconveyance was a natural and necessary consequence.

But the defendant offered to show a very different state of facts. Three times he sought permission to prove that the deed was delivered by Mrs. Blazy and accepted by him as a complete and absolute transfer of the lots, and for which he agreed to allow two thousand dollars as a payment upon her husband's contract. By the evidence of Blazy, the husband, it appears that there were two occasions on which the subject of the deed was more or less discussed with the wife. One of these was on the day of the execution of the contract, and the other on the next day when the deed was signed and acknowledged. The defendant offered to prove that on each of these occasions it was explained to Mrs. Blazy that the deed was to be absolute, and the value of the lots be at once applied upon the contract. This evidence was steadily excluded. Just that agreement with the wife was pleaded in the answer, and no ground of objection was stated on the trial, and no allusion to the point is made in the opinion of the General Term. The rulings are briefly defended by the respondent upon the ground that the written contract was conclusive. That is true where the contest is between the parties to the instrument, but not true as against a stranger to it. (*Sprague* v. *Hosmer*, 82 N. Y. 466; *Lowell Manfg. Co.* v. *Safe. F. Ins. Co.*, 88 id. 591.) Mrs. Blazy was no party to this contract and not bound by it. Notwithstanding the agreement of the parties to take the lots as collateral, she was at liberty to apply them absolutely or not at all on her husband's contract, and the parties to that were at liberty to induce her, if they could fairly, to take that action. When the deed was executed the three parties and Mrs. Blazy were together, and one of defendant's offers was to show that on that occasion the effect of the deed was explained to her, and she agreed to deliver it absolutely as a payment of $2,000 on the contract, which the defendant agreed to accept and indorse. I cannot discover any lawful objection to that evidence. It does not even contradict or vary the writing. It only shows performance. By the contract Blazy and White

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were to pay two thousand dollars at any time before the vendor should convey and Mrs. Blazy's deed was to be given as security. But if she paid the $2,000 at once no security was needed, and the proof offered showed simply an immediate payment in accord with the terms of the contract, and which merely made the provision for security needless, and superfluous. The rejected evidence shut out the defense, and I am compelled to say that its rejection seems to me to have been a material error.

For this reason the judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except Ruger, Ch. J., not voting.

Judgment reversed.

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Michael McQuigan, Respondent, *v.* The Delaware, Lackawanna and Western Railroad Company, Appellant.

The Supreme Court has no inherent power and, in the absence of a statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify on the trial as to the existence or extent of the alleged injury.

Walsh v. *Sayre* (52 How. Pr. 334), overruled.

Schroeder v. *C., R. I. & P. R. Co.* (47 Ia. 375), disapproved.

Briggs v. *Morgan* (2 Hagg. Cons. Ct. 324); *Devanbagh* v. *Devanbagh* (5 Paige, 554); *Newell* v. *Newell* (9 id. 25), distinguished.

(Argued October 19, 1891; decided December 1, 1891.)

Appeal from order of the General Term of the Supreme Court in the fourth judicial department, made April 28, 1891, which affirmed an order of the Special Term denying a motion by defendant for an order directing the plaintiff, in an action for personal injuries, to submit to a physical examination by surgeons to be appointed by the court, and for the appointment of a receiver, under whose direction such examination should take place.

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Special and General Ter
appealable. (*Tilton* v.
Stevens, 63 id. 341; *Tolm*
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plaintiff. (*Neuman* v.
erts v. *O. & L. C. R*
v. Devanbagh, 5 Paige,
wrence v. *Ocean Ins.*
3 Cow. 17; *Brush* v.
d. 399; *Schroeder* v.
& M. T. Co. v. *Baily*,
R. Co., 61 Wis. 536;
atfield v. *S. P. & D.*
. Graham, 74 N. C. 6
; *S. C. & C. R. R. C*
y v. *City of Springfie*
y v. *Benedict*, 22 Ill. A
. 334.)

Hamilton for respondent
plaintiff in a case of
examination by his adv
., 18 J. & S. 412; *R*
Elfers v. *Woolley*, 116 N
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J. The sole question
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know it was first presented in 1868 before a judge of the New York Superior Court at Special Term in the case of *Walsh* v. *Sayre* (52 How. Pr. 334), who affirmed the existence of the power. The contrary was held by the General Term of the third department in *Roberts* v. *Ogdensburgh & Lake Champlain Railroad Co.* (29 Hun, 154). In 1877 the Supreme Court of Iowa in the case of *Schroeder* v. *C., R. I. & P. R. Co.* (47 Iowa, 375), sustained the doctrine that the court had an inherent jurisdiction to grant a compulsory order that the plaintiff submit to such examination, and this decision has been followed by the courts of several of the western and southern states, and in others the power has been denied. The same question was considered in the United States Supreme Court in the recent case of *Union Pacific Railroad Company* v. *Botsford* (141 U. S. 250), and the court (two judges dissenting) decided adversely to the claim that the court had power to compel such examination. The opinions of the several courts which have passed upon the question present very fully the considerations bearing upon it. We concur in the view taken by the Supreme Court of this state and the Supreme Court of the United States, and we can add very little to the full discussion to be found in the opinions of those courts.

The powers of courts are either statutory or those which appertain to them by force of the common law, or they are partly statutory and partly derived from immemorial usage, which latter constitutes their inherent jurisdiction. They are organized for the protection of public and private rights and the enforcement of remedies. Presumptively, therefore, whatever judicial procedure is essential to enable courts to exercise their function is authorized. The maxim that there is no right without a remedy, justified the courts in the earlier periods of the common law in inventing writs and modes of procedure adapted to present for adjudication in proper form every question of judicial cognizance. The powers and jurisdiction of the courts of common law and chancery in England are to be found in the English statutes and in the rules, pre-

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but it is strange if the power in question
have been unused for centuries and never l
into activity. In two cases cited by Justi
opinion in *Union Pacific Railway Co.* v. *Bot*
Court of Common Bench, in England, refuse
inspection of a building, on the application of
action for work and labor performed by him
ground of want of power. (*Newham* v. *Tat*
Turquand v. *Strand Union*, 8 Dow. Pr. 2(
tend to negative the existence of the powe
courts claimed for our courts in the case a
authority in the English common-law court
analogous is found in the power which the c
have occasionally, though rarely exercised,
application of apparent heirs the writ *de ve*
to compel a widow, claiming to be with child
husband, to submit her person to examinatio
in England is *sui generis*, and has never be
It may have originated in the peculiar favo

by the law of England, but whatever its origin, it seems repugnant to common right, and the fact that in this instance only have the courts of England exercised the power to compel the examination of the person in a civil proceeding, tends to show that the power is not there regarded as general, but special and peculiar, and limited to the particular case. The doctrine of the cases in Chancery (*Briggs* v. *Morgan*, 2 Hagg. Cons. Ct. 324; *Devanbagh* v. *Devanbagh*, 5 Pai. 554; *Newell* v. *Newell*, 9 id. 25), that in an action to procure a decree of nullity of marriage on the ground of impotence or sexual incapacity, the chancellor may compel the defendant to submit to a surgical examination, is a graft from the civil and common law, and, as has been said, "rests upon the interest which the public, as well as the parties, have in the question of upholding or dissolving the marriage state, and upon the necessity of such evidence to enable the court to exercise its jurisdiction." (Gray, J., in *Union Pacific Railway Co.* v. *Bottsford*, *supra.*)

When we examine the history of the power of common-law courts to compel the production and inspection of books and papers in possession of the opposite party in a civil action, we find that originally the courts disclaimed any power in the matter, and the remedy by bill of discovery was the only resource of the party desiring such discovery. Finally, the common-law courts assumed a limited equitable jurisdiction over the subject, and in addition to the rule that a party pleading a deed should make profert of the instrument which enabled the other party to demand oyer, the courts by order compelled a party who in his pleading relied upon a written instrument, not a deed, to give inspection to the other party, if required, and so in other special cases. The courts in this state, prior to any statute, exercised a limited equitable jurisdiction of the same character. (*Lawrence* v. *Ocean Ins. Co.*, 11 Jo. 245; *Denslow* v. *Fowler*, 2 Cow. 592, note.) But this limited jurisdiction was exercised sparingly and with hesitation, and it was not until statutes were enacted in England and in this state, conferring upon com-

ourts the same power to compel the
tion of books and papers, which was exer
chancery on bills of discovery, that courts
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. 15 Vict. chap. 99; Stt 17 and 18 Vict. cl
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missible, or the rule of the common law that parties shall not be witnesses, or that interest disqualifies. They may apply existing rules to new circumstances. Nor is it, we conceive, within the power of the court to create remedies unknown to the common law, or institute a procedure not according to the course of the common law. It is most important that courts should proceed under the sanction of an orderly and regulated jurisdiction, and that as little as possible should be left to the discretion of a judge. The exercise by the court of the power now invoked, as has been shown, is not sanctioned by any usage in the courts of England or of this state. Its existence is not indispensable to the due administration of justice. Its exercise depending on the discretion of the judge, would be subject to great abuse. We think the assumption by the court of this jurisdiction, in the absence of statute authority, would be an arbitrary extension of its powers. It is a just inference that an alleged power which has lain dormant during the whole period of English jurisprudence, and never attempted to be exercised in America until within a very recent period, never in fact had any existence.

We have purposely omitted to repeat the views and authorities upon this question, set forth in the opinions in *Roberts* v. *Oydensburgh & L. C. R. R. Co.*, and in *Union Pacific Railway Co.* v. *Bottsford*, and we refer to those opinions for a fuller discussion of the grounds upon which the denial of the power claimed proceeds.

The order should be affirmed.

All concur.

Order affirmed.

NG, as Executor, etc., Respondent, *v.* '
AND KINGSTON GAS LIGHT COMPANY et
S.

rt in dissolving a temporary injunction, where
be the defeating of plaintiff's remedy without
ified that the case is one, in which, by settled a
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proposed consolidation, if carried out, would b
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to come within the act authorizing the consoli
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and injustice and is, in some of its features,
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n was not reviewable here.

r 19, 1891; decided December 1, 1891.)

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facts are stated in the opinion.

for appellants. The injunction was un
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Henry v. *Jewett*, 90 N. Y. 58.) There
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Statement of case.

proposed consolidation as being unjust or unfair to the plaintiff. (Laws of 1884, chap. 367.) The act upon which the consolidation proceeding is based is constitutional. (Const. N. Y. art. 8, § 1; 1 R. S. chap. 18, § 8; Laws of 1848, chap. 37, § 23; *People* v. *O'Brien*, 111 N. Y. 1; Code Civ. Pro. § 2419; *People ex rel.* v. *Rice*, 33 N. Y. S. R. 34.) The authorities sustain the act of 1884 as an exercise of the power reserved to the legislature in the Constitution to alter and repeal charters. (*R. R. Co.* v. *Miller*, 10 Barb. 260; *Bailey* v. *Hollister*, 26 N. Y. 112; *In re Lee & Co.'s Bank*, 21 id. 9; *N. Y. C. C. Co.* v. *C. S. R. R. Co.*, 40 Hun, 29; *P. R. Co.* v. *Thacher*, 11 N. Y. 102; *P. P. Co.* v. *Griffin*, 21 Barb. 454; *B., E. P. C. R. Co.* v. *Dudley*, 14 N. Y. 336; *In re Reciprocity Bank*, 32 id. 9; 17 How. Pr. 223; *R. R. Co.* v. *Brownell*, 24 N. Y. 345; *White* v. *R. Co.*, 14 Barb. 559; *Hyatt* v. *McArdle*, 25 id. 457; *Bishop* v. *Brainard*, 38 Conn. 289; 13 Wall. 190.) The authority of the legislature to authorize a consolidation of corporations is in certain instances the exercise of the right of eminent domain, and such is the nature of the act of 1884 as applied to the corporations in question. (Boone on Corp. § 188; Field on Corp. [Wood's ed.] §§ 390, 391; Green's Brice's Ultra Vires [2d Am. ed.], 632; Morawetz on Corp. § 1089; Laws of 1884, chap. 367, § 2; *N. O. G. Co.* v. *L. L. Co.*, 115 U. S. 650; Dillon on Mun. Corp. [4th ed.] § 3; *New Orleans* v. *Clark*, 95 U. S. 644.)

John J. Linson for respondent. The order appealed from is not reviewable here. (*H. R. T. Co.* v. *W. T. & R. R. Co.*, 121 N. Y. 397; *Sedrow* v. *Baker*, 93 id. 59.) As between the corporation and the stockholders, the charter is a contract prescribing to the corporation that it shall not attempt to materially change, extend, alter or abandon the particular business which that charter authorizes the corporation to do. Any attempt of the corporation to make such a change, extension, alteration or abandonment would be an unlawful act, which a single stockholder may prevent by injunction or set aside by a suit in equity. (Cook on Stocks and Stockholders, §§ 493, 666;

ch, 4 Johns. Ch. 573; *Copel*
L. Co., 61 Barb. 60; *Blatchford* v. *Ross*, 54 i
v. *Forbes*, 11 id. 587; *H. & N. H. R. R. Co*
5 Hill, 383; *Ormsby* v. *V. C. Co.*, 56 N. Y. (
Leslie, 110 id. 519; *Pierce* v. *Madison*, 21 How
As between the state and the corporation, and
the stockholders, the charter is a contract pro
clause of the Constitution which provides that
pass any law impairing the obligations of a contrac
ton R. R. Co. v. *Reid*, 13 Wall, 244; *In re*
Y. 1; *People* v. *O'Brien*, 111 id. 1, 49; *S. T.*
42 Ind. 498; *Pearce* v. *Madison*, 21 How.
McCray v. *J. R. R. Co.*, 9 Ind. 358; *Booe* v.
10 id. 93; *New Orleans* v. *Harris*, 27 Miss. 5
R. R. Co. v. *Strait*, 35 N. J. L. 322; *Fry* v.
Co., 2 Met. 314.) As against the objection of
the gas company could not effect this proposed
even by and with legislative sanction, were i
reserved right of the state to alter, amend and
and acts of incorporation. It cannot under
right. (*S., etc., Co.* v. *Thatcher*, 11 N. Y.
Dillard, 15 B. Mon. 340; *Commonwealth*
Gray, 239; *Orr* v. *Bracken*, 81 Ky. 593; *O.*,
v. *Vesie*, 39 Me. 571; *Mills* v. *C. R. R. Co.*
1; *Ferguson* v. *Meredith*, 1 Wall. 25; *K., etc.*
March, 17 Wis. 13; *Mowrey* v. *I. R. R. Co*
Laws of 1848, chap. 37, § 23; *People* v. *O'Br*
1.) The plaintiff is a tenant in common with t
holders in the property, real and personal, and
of the gas company. (*Livingston* v. *Lynch*, 4 J
Irvine v. *Forbes*, 11 Barb. 587; *Plimpton* v. *I*
Y. 592; Laws of 1886, chap. 268; *People* v.
N. Y. 1.) The statute assailed cannot be susta
exercise of the power of eminent domain. (Co
Lim. 528; Mills on Em. Domain, § 50; Dillon
§ 469; *Phillips* v. *D., etc., R. R. Co.*, 78 Pen
W. Co. v. *Burkart*, 41 Ind. 364; *Dyckman* v

5 N. Y. 434; *Cole* v. *LeGrange*, 113 U. S. 1; *L. Assn.* v. *Topeka*, 20 Wall. 655; *Weismer* v. *Douglas*, 64 N. Y. 91; *Burlington* v. *Beasley*, 94 U. S. 310; *Hay* v. *C. Co.*, 3 Barb. 42.) The act in question does not authorize the consolidation of the gas and electric light companies. (Laws of 1890, chap. 416.)

FINCH, J. The doctrine recently declared in *Hudson River Telephone Co.* v. *Watervliet T. & R. R. Co.* (121 N. Y. 397), seems to us decisive of this appeal. To dissolve an injunction with the inevitable result of defeating plaintiff's remedy without a trial, we must be entirely satisfied that the case is one in which by settled adjudication the plaintiff, upon the facts stated, is not entitled to final relief. We cannot say that of this plaintiff's complaint in advance of a trial.

The grievance alleged and sought to be prevented is a proposed consolidation of two companies which it is claimed will be ruinous to the stockholders of one. And the grounds of resistance alleged are that the two corporations are not so similar as to come within the legislative provision, that the act itself is permissive merely and does not exclude the interference of the court to prevent a wrong and injustice, and that the law of 1884 is in some of its features unconstitutional. These are grave and serious questions. On this motion we ought not to decide them.

Whether the gas company and the electric light company are "similar," within the meaning of the statute when their modes of operation are different, and one is organized not merely to supply light but to manufacture and sell the apparatus for that purpose, is a question fairly open to discussion; and the other questions are too debatable to be decided on this motion.

The appeal should, therefore, be dismissed, with costs.

All concur.

Appeal dismissed.

Statement of case.

VALENTINE HAMMANN, Appellant, *v.* RICHARD JORDAN, Respondent.

The term "party-wall" does not necessarily imply an absolutely solid structure, and there is no rule requiring a wall to be such a structure in order to be a party-wall.

In an action upon a contract, by which defendant agreed to pay half the expense of building a party-wall, it appeared that plaintiff built flues in the wall which encroached upon defendant's half. Plaintiff's counsel called as a witness an architect and asked him if it was customary to build flues in party-walls. This was objected to; said counsel stated that he desired to show it was a proper thing to put a flue in a party-wall. The court sustained the objection. *Held*, error.

Fettretch v. *Leamy* (9 Bos. 510), distinguished.

It was proved that to correct the defect caused by the flues and to give defendant substantially a similar use of the wall as that enjoyed by plaintiff, would cost from $128 to $130. *Held*, that the question as to whether there was such a substantial failure to comply with the agreement as would not authorize a deduction of the cost of curing the defect and grant judgment for the balance, was one of fact for the jury.

To prove that the encroachment of the flues on defendant's land was not willful, plaintiff, as a witness in his own behalf, was asked whether he intended to have the wall built correctly with regard to the flues. This was objected to and excluded. *Held*, error; that it was competent for plaintiff to show that he did not encroach intentionally upon defendant's premises.

Defendant claimed and some of his witnesses testified that the wall was not capable of a substantially similar use by him as by plaintiff, and one of them swore that there should have been a four-inch partition line between the flues in order to give defendant the same opportunity of using the wall as plaintiff. There was proof that defendant could obtain such opportunity by expending a certain amount for a chimney breast. A motion for a nonsuit was granted. *Held*, error; that assuming it to be a condition precedent to a recovery that an opportunity for a substantially similar use should exist, the questions as to what would amount to a substantially similar use and whether, after deducting the expense incurred by defendant for a chimney breast, plaintiff should have judgment for the balance of his claim were questions of fact for the jury.

Also *held*, that if defendant suffered any further damage by reason of plaintiff's encroachment, in the way of being compelled to use some portion of his lot for an additional wall, the amount of such damage would be for the jury to determine, and they should, if the amount is not so great as to show a substantial departure from the contract, deduct the same from the recovery otherwise allowable.

Statement of case.

ne if the amount of damages is of so substantial a nature as to cause jury to conclude that the encroachment itself, whether innocent or lful, was a substantial departure from the contract, the verdict should for the defendant.

peared that plaintiff in building the wall left openings for windows. laintiff proved that defendant saw these openings when the wall was ng built and consented thereto. *Held*, that defendant could not there- er change his mind and claim that the insertion of the windows was iolation of the agreement.

rgued October 20, 1891; decided December 1, 1891)

PPEAL from judgment of the General Term of the Superior rt of the city of New York, entered upon an order made ch 26, 1891, which modified, and affirmed as modified, a gment in favor of plaintiff entered upon a decision of the t on trial at Circuit.

his was an action upon a contract by which defendant agreed ay one-half the expense of a party-wall erected by plaintiff veen their adjoining premises in the city of New York.

he facts, so far as material, are stated in the opinion.

acob F. Miller for appellant. There was a disputed ques- of fact, and it should have been submitted to the jury. *clair* v. *Talmadge*, 35 Barb. 602; *Glacius* v. *Black*, 50 Y. 148; *Phillips* v. *Gallant*, 62 id. 264; *Fiedder* v. *Dar-* 50 id. 437; *Thurston* v. *Cornell*, 38 id. 281; *Baylies* v. *kroft*, 81 id. 371; *Forbes* v. *Waller*, 25 id. 430; *Woodward Fuller*, 80 id. 312; *Noah* v. *Whitney*, 88 id. 648.) Defend- could not avoid using the wall. (*Kingsland* v. *Tucker*, N. Y. 578; Laws of 1887, chap. 566.) The amendment ne building law could not invalidate the contract. (Laws 882, chap. 410, §§ 476, 477.) The defendant claimed that plaintiff agreed to build a party-wall, and then defined a y-wall to be one which stood equally on both lots and was e in all particulars on each side of the dividing line. He claimed that any departure from this definition defeated plaintiff's claim. The court erred in adopting this definition contention. (*Fettretch* v. *Leamy*, 9 Bosw. 521; Washb. on l Prop. [4th ed.] 605; 2 id. 385; *Rogers* v. *Sinzheimer*,

Statement of case.

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avens for respondent.
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Laws of 1887, chap. 566, § 5; Laws of 1882, chap. 410, § 476; *Kingsland* v. *Tucker*, 115 N. Y. 574; *Shaw* v. *Hitchcock*, 119 Mass. 284.) The trial court erred in awarding an allowance to the plaintiff upon the amount of defendant's counterclaim after having dismissed the complaint, and such award was properly overruled by the General Term. (*Downing* v. *Marshall*, 37 N. Y. 380; Code Civ. Pro. § 3253; *Devlin* v. *Mayor, etc.*, 15 Abb. [N. S.] 31; *Thayer* v. *Holland*, 63 How. Pr. 179; *Whitlegge* v. *De Witt*, 12 Daly, 319; *Crane* v. *Holcomb*, 2 Hilt. 271; *Ury* v. *Wilde*, 15 Civ. Pro. Rep. 451.)

PECKHAM, J. The plaintiff and defendant entered into an agreement for a party-wall of the length of seventy-eight feet, more or less, between their premises in Charles street in the city of New York. The plaintiff was to build it and the defendant agreed that when he made use of it in the erection of any building on his premises, he would pay plaintiff the sum of seven hundred and fifty-one dollars and sixteen cents, being one-half the sum to be expended in its erection. The plaintiff built the wall and left some openings for windows therein and put in some flues. The flues it was contended overreached the center of the wall by some two inches. The wall was twelve inches wide.

As to the windows the plaintiff testified that the defendant saw the wall while plaintiff was building it, and saw the spaces left and which were intended for windows, and asked plaintiff about them. The plaintiff explained to him how he proposed to do the work, and the defendant was satisfied and said: "If you do that, I have nothing to say." He raised no objections thereafter until he commenced to build, which was some years subsequent to the completion of the wall, and he now claims that the leaving of the spaces for the windows and the encroachment of two inches by means of the flues upon the defendant's side of the wall, left it in such condition that he could not make substantially the same use of the wall that the plaintiff had, and that hence he was not bound to pay the amount stated in the agreement, or any sum whatever.

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be absolutely solid under all circumstances in order to be a party-wall. We think it was proper, therefore, to ask an architect in the city of New York whether it was not customary to build party-walls with flues in them. Presumably he was familiar with the manner of erecting such walls in that city when nothing but a party-wall *in terms* was called for and if it were a fact that it is customary in building them to put flues therein, their presence in this party-wall, in the absence of some agreement to the contrary, would not be a violation of contract on the part of the plaintiff.

It is true that party-walls are frequently erected under written agreements, which agreements may provide for flues or openings or for solid walls. It is also true that the term "party-wall" does not yet necessarily imply a solid structure and, therefore, what the general custom is in New York in regard to flues when party-walls are erected, may be some evidence of the meaning of the term as used in such an agreement as this. We think it was competent and should have been admitted. (*Smith* v. *Clews*, 114 N. Y. 190.)

In *Fettretch* v. *Leamy* (9 Bos. 510, 525) the learned judge, who there delivered the opinion of the court, assumed that evidence that the term "party-wall" had acquired by usage or custom in the city of New York any peculiar significance would be proper. The Pennsylvania cases cited by counsel are essentially different.

If proper to erect a party-wall with flues therein, the next inquiry would be whether the encroachment of two inches, already referred to, was such a substantial failure to comply with the agreement that the court could not permit a deduction for the cost of curing the defect and grant judgment for the balance.

Upon the evidence we think this was a question of fact. Even if the testimony were in substance uncontradicted as to the existence of the defect, the cost of curing it and the consequences resulting to the defendant, still in such a case as this we think it was proper to submit to the jury the question upon all the evidence whether there was or was not a *bona fide* and

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Statement of case.

If the defendant, in fact, suffered any further damage by reason of this encroachment in the way of being compelled to use some portion of his lot for an additional wall, which but for such encroachment he would not have been compelled to use, the amount of such damage it would be for the jury to determine, and that amount should be deducted from the recovery otherwise allowable. If the amount were of so substantial a nature as to cause the jury to conclude that the encroachment itself was, whether innocent or willful, a substantial departure from the contract, then the verdict should be for the defendant so far as the plaintiff's cause of action was concerned.

These matters can be properly submitted to a jury upon a new trial.

We think the case should not have been taken from the jury and the judgment of nonsuit should, therefore, be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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THE PEOPLE ex rel. OAK HILL CEMETERY ASSOCIATION, Respondent and Appellant, *v.* LUTHER A. PRATT et al., as Assessors, etc., Appellants and Respondents.

The lands of a cemetery association, organized under the act of 1847 (Chap. 133, Laws of 1847), by virtue of the provision thereof (§ 10), which declares that the cemetery lands and property of any association formed under the act shall be exempt from taxation, are exempt from the moment they are acquired by the association, and continue exempt so long as the corporation exists, although no dead body is buried therein, and although by a valid ordinance, passed after its incorporation by a municipality within whose limits its lands lie, the burial of the dead therein is forbidden.

Under the provisions of the charter of the city of Rochester (§ 40, chap. 14, Laws of 1880), giving to the common council power "to make, modify and repeal ordinances and by-laws to regulate the burial of the dead," that body has power to forbid by ordinance the burial of the dead in lands of a cemetery association within the city limits; and this, although at the time the association took the conveyance of its lands, it was lawful to use them for cemetery purposes.

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upon the finding of fact in respect of advertising and procuring the consent of the board of supervisors; such finding was not only unsupported by any evidence but it would be immaterial if it were established. (Laws of 1852, chap. 280, § 4.) The city of Rochester has no more power to interfere with the acquisition of the title to lands, or to the devotion of them to the purposes provided by the act of 1847, than any other corporation. (Laws of 1880, chap. 14, § 40.)

George F. Danforth for respondents. The burden is upon the relator to show some ground for the exemption. (Laws of 1847, chap. 133, §§ 1, 4, 5, 6; Laws of 1869, chap. 708; Laws of 1879, chap. 310, § 2.) The act of 1847 has no proper application to an urban or city cemetery. (Laws of 1852, chap. 280; Laws of 1854, chap. 238; Laws of 1871, chap. 164.) The whole matter was under the control of the common council of the city. (Laws of 1830, chap. 14, § 40; Laws of 1834, chap. 199, §§ 8, 18, 46; *Church* v. *Mayor, etc.*, 5 Cow. 538; *Coales* v. *Mayor, etc.*, 7 id. 585; Laws of 1813, chap. 86.)

C. D. Kiehel for respondents. The property in question is not exempt from taxation. (Laws of 1880, chap. 14, § 40; *People* v. *Roper*, 35 N. Y. 632, 635, 638; *People* v. *Board of Assessors*, 84 id. 610; *Cronin* v. *People*, 82 id. 318; *Coates* v. *Mayor*, 7 Cow. 585; *Berholf* v. *O'Reilly*, 74 N. Y. 522; Dillon on Mun. Corp. [4th ed.] § 142.) No consent to burial in the premises in question can be implied from the ordinance of March 19, 1889, or from the omission of the property from the assessment-rolls for the year 1889 by the assessors. (Laws of 1865, chap. 456; *Overing* v. *Foote*, 43 N. Y. 290; *People ex. rel.* v. *Assessors of Brooklyn*, 92 id. 430.) It was error to allow the witnesses of the relator to give their opinions of the comparative values of the properties of Smith, Stanley, Corser, and Ellwanger & Barry, near or adjacent to the property in question. (*People* v. *Warren*, 47 Hun, 448; 109 N. Y. 576; *People ex. rel.* v. *Carter*, 109 id. 576; *People ex. rel* v. *Christie*, 115 id. 158.) The assessors complied with the laws of this state, in

delivering the assessment-rolls. (1
Laws of 1890, chap. 561; *Peop*
People ex. rel. v. *Palmer*, 52 id. 8
. 18; *Weiler* v. *Neubach*, 114 id

ıe relator, The Oak Hill Cemeter
ts land, situated in the city of R
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s illegal and unauthorized. It was
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1889, the ordinance was again a
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me that no body has been buried
tery, and the important question for us to determi
the relator's land, under the act of 1847 is exemp
tion, although, so long as the ordinance remains i
present framed, no burials can be made therein.

We have no doubt that the relator was properly
It was not obliged to obtain the consent of the cit
ter to its incorporation, nor, as has been contende
of the defendants, was it obliged to obtain the c
supervisors of the county of Monroe. The acts,
of the Laws of 1852, chapter 238 of the La
chapter 164 of the Laws of 1871, and chapter 38
of 1889, to which our attention has been called,

to cemeteries in the county of Monroe, and relate only to the counties mentioned in those acts.

We have no doubt that the common council had power to pass the ordinance prohibiting the burial of the dead in this cemetery. Under the charter of the city (Laws of 1880, chap. 14, § 40), it is provided that the common council shall have power to "make, modify and repeal such ordinances, by-laws and regulations as it shall deem reasonable within the said city for the following purposes;" and among the purposes specified is "to regulate the burial of the dead." Under the power to regulate, the common council could prohibit the burial of the dead within the city limits. (*Cronin* v. *People*, 82 N. Y. 318.)

This ordinance is a police regulation which the legislature could authorize the common council to pass. (*Brick Church* v. *Mayor, etc.*, 5 Cow. 538; *Coates* v. *Mayor, etc.*, 7 id. 583; *Matter of Ryers*, 72 N. Y. 1.)

It is immaterial that at the time the relator took the conveyance of its land it was lawful to use it for cemetery purposes and to bury the dead therein. The power possessed by the common council to regulate the burial of the dead is a continuing power, and it may be exercised in its discretion from time to time as the public health and welfare may require. So, we have no doubt that so long as the ordinance remains in force no dead body can be buried in this cemetery, and yet we reach the conclusion that its land cannot be taxed under the law of 1847. Section 1 of that act provides that any number of persons residing in this state, not less than seven, who shall desire to form an association for the purpose "of procuring and holding lands to be used exclusively for a cemetery, or place for the burial of the dead," may form a corporation as provided in that and the two following sections. Section 4 provides that any association incorporated under the act may take by purchase or devise, and hold within the county in which the certificate of its incorporation is recorded, not exceeding two hundred acres of land, to be held and occupied exclusively as a cemetery for the burial of the dead, and further provides that "such land, or such parts thereof as may

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ment in a lot or plot so transferred, such lot or plot, from the time of such first interment, shall forever thereafter be inalienable, and shall, upon the death of the holder or proprietor thereof, descend to the heirs at law of such holder or proprietor and to their heirs at law forever."

It is thus seen, by this brief review of the provisions of the act, that the land of the relator is held exclusively for cemetery purposes, and that it cannot be devoted to or used for any other purpose. It has no power to sell any of its land except to persons who desire it for burial purposes, and all of its land, the moment it acquires it, and before a dead body is buried therein, is absolutely exempt from all taxation. The cemetery land of such a corporation, not only, but all its property, is thus exempt. So long as Oak Hill cemetery exists as a corporation, it must hold its property exclusively for cemetery purposes, and while burials cannot now be made therein, the ordinance prohibiting them may be repealed or modified at any time so as to allow them. There is no provision in the statute that its land shall be exempt from taxation only so long as burials are authorized to be made therein. The exemption is absolute.

There is nothing in the act, chapter 708 of the Laws of 1869 or chapter 310 of the Laws of 1879, which affects the exemption from taxation conferred by section 10 of the act of 1847. By the act of 1869, section 10 is amended only in reference to the rights of individual proprietors of lots, and it in no way changes the exemption of the corporation from taxation as provided in section 10 of the act of 1847. The act of 1879, is not an amendment of the act of 1847, and does not relate to cemeteries owned by corporations organized under that act. It relates to other cemeteries not established under that act. This fully appears from section 2, which is as follows: "Whenever any such land shall cease to be used for cemetery purposes, any judgment, tax or assessment which, but for the provisions of this act, would have been levied, collected or imposed, shall thereupon forthwith, together with interest thereon, become and be a lien, and charge upon such land, and collectible out

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Statement of case.

the dead in its land. All its land and property are exempt from taxation, and we must give force and effect to the statute.

The orders of the General and Special Terms should be reversed, and the assessment upon the relator's property ordered to be vacated and stricken from the assessment-roll, with costs to the appellant in all the courts.

All concur.

Orders reversed.

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134-328.

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d169	2 25

PETER KEARNEY, Respondent, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Appellants.

Prior to the construction of defendants' elevated railroad in a street in the city of New York, premises abutting on said street, then a vacant lot, were leased to one S. for a term of years, the lessor covenanting that, if during said term the lessee erected upon said lot a building of a character described, she would at the expiration of the term pay the value of the same or grant a renewal for another term. The lessee built upon said premises and thereafter assigned the lease to plaintiff, who took possession and has since then been in possession. After the construction of defendants' road and upon the expiration of the term the lessor, in accordance with the covenants of the lease, executed to plaintiff a new lease which contained similar provisions as to renewal and the purchase of the building on the premises. In an action to restrain the operation of said road and for damages, the court granted the injunction, unless defendant paid a sum fixed as the value of the easements appropriated or interfered with, and awarded damages for injuries to the property during the six years preceding the commencement of this action. *Held*, no error; that plaintiff's title and right of possession date from the assignment of the lease to him; that the new lease must be regarded as simply a continuation of the prior one; that plaintiff for the purposes of the case was to be construed as the owner of the building and was entitled to recover such sum as represented its diminished rental value caused by the construction and operation of the road.

Also *held*, that plaintiff was entitled to damages for the period during which the premises were leased by him to sub-tenants.

The distinction pointed out between this case and that of a tenant holding under a lease executed after the construction of the road.

(Argued October 9, 1891; decided December 1, 1891.)

Robinson v. *Smith*, 7 N. Y. Supp. 38; *Dolan* v. *Merritt*, 18 Hun, 28; *Mulford* v. *Wager*, 7 N. Y. Supp. 88.) There was no error in permitting a witness to state that a shadow was caused by the station. (*Kane* v. *N. Y. E. R. Co.*, 125 N. Y. 187; *Lahr* v. *M. E. R. Co.*, 104 id. 268.)

O'BRIEN, J. The judgment in this case contains an injunction restraining the defendants from the continued maintenance and operation of their elevated railway in front of the plaintiff's premises No. 738 Sixth avenue in the city of New York, unless, within the time fixed therein, the defendants pay to the plaintiff the sum of $525, as the price of so much of the plaintiff's easements, or other property appurtenant to his said premises, as are taken, appropriated or otherwise interfered with by the maintenance and operation of the railway. The judgment also awards to the plaintiff the sum of $1,062 for the injuries to his property sustained during the six years preceding the commencement of the action, with the interest thereon. The questions involved in this appeal are in respect to the plaintiff's interest in the property. The building is a four-story brown stone front, the second above 42d street, the first story being used as a store, and the apartments above fitted up for dwellings. One of the passenger platforms of defendants' stations extends across the entire front of the building. The nature of the plaintiff's interest appears from the following facts found by the trial court: On the 1st of May, 1863, Glorvina N. Hoffman, who was then the owner of the lands, executed and delivered to one John C. Sares, a lease in writing and under seal, in which her husband joined, whereby she demised to Sares the premises, which, it seems, then consisted of a vacant lot only, for a term of twenty-one years from that date, at the yearly rent of $250 per year, besides all taxes and assessments. The lease also contained numerous conditions and covenants, none of which need be referred to, except the following: It was stipulated that if during the term the lessee should erect upon the lot a dwelling three stories or more in height above the basement, and constructed of brick or stone,

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the price paid by plaintiff was with reference to the situation then existing. But two points have been argued by the defendants upon this appeal: 1. That as plaintiff took a lease of the premises in 1884, after the construction of defendants' road, he has no right to substantial damage or an equitable remedy. 2. That the plaintiff cannot recover damages for the period during which the premises were leased by him to tenants.

The first point ignores the fact already pointed out that plaintiff's title accrued in 1866 and before the construction of the road. The lease of 1884 cannot be deemed a new or voluntary arrangement, but a continuation of the lease of 1863, which the plaintiff may have been obliged to enter into in order to preserve his existing rights. The plaintiff's rights under the lease of 1884 are but an extension of the rights acquired under the lease of 1863. He was for all the purposes of this case the absolute owner of the building since 1866, and we perceive no reason why he was not entitled to recover such sum as represented its diminished rental value in consequence of the construction, maintenance and operation of the defendants' railroad. This is not the case of a tenant, under a lease made after the road was built, suing for an injury to his possession, but an owner under title acquired before that time, seeking to recover for loss of rents. As such owner of the building he could also recover such permanent injury as he sustained by the appropriation by the defendants of such easements as were taken and were appurtenant to the house and a part of it. The trial court found that for more than half the period prior to the commencement of the action for which the rental damage was recovered, the premises were in the possession and occupancy of tenants under the plaintiff. The defendants' counsel insists here, as he did in the court below, that no damage should be allowed for this period, as the injury, if any, was inflicted upon the tenant. Since the argument, that point has been determined against the defendant in another case. That decision must control the disposition to be made of this case, and we will not attempt to add anything to the reasoning

ne result was reached. (*Kerno*
128 N. Y. 559.)
ment should, therefore, be affirm
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t affirmed.

MORTIMER et al., as Executors, *e*
MANHATTAN RAILWAY COMPANY

property in the city of New York a
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real estate was called as a witness by
to give his opinion as to the extent the rental valu
diminished per annum by the structure and the pass
This was objected to by defendant's counsel "as
and immaterial, as assuming that the property has
way, and as requiring the witness to separate such
to other causes." The court overruled the objection,
the objection made did not present the real objec
i. e., that it sought to substitute the opinion of the
ment of the jury.

Roberts v. *N. Y. E. R. Co.* (128 N. Y. 455), distinguis

(Argued October 9, 1891; decided December 1, 189

APPEAL from judgment of the General Te
Court of the city of New York, entered up
March 2, 1891, which affirmed a judgment
tiffs entered upon a verdict, and affirmed a
motion for a new trial, and reversed an orde
setting aside a portion of the verdict.

he nature of the action and the facts, so far as n
tated in the opinion.

rainard Tolles for appellant. Plaintiffs cannot
ny interference by defendant with the use or enj
he property in question or of the easements appu
eto, because during the period sued for they did n
right to such use and enjoyment. (*Doyle* v. *Lord*
432; *Sherman* v. *Williams*, 113 Mass. 481; *Ho*
nsworth, 128 id. 487; *Tobias* v. *Cohn*, 36 N. Y
mes v. *Seeley*, 19 Wend. 507, 509; *Campbell* v. *A*
hns. 511; *Elen* v. *Luyster*, 60 N. Y. 252, 259; *S*
Burr, 1 Hilt. 39; Waterman on Trespass, §§ 948, 94
lman v. *M. E. R. Co.*, 121 N. Y. 125; *Kane* v. *N*
Co., 125 id. 181; *Wager* v. *T. U. R. Co.*, 25 i
ller v. *B., etc., R. Co.*, 46 id. 686.) In no aspect
can the recovery of damages for the period prior
885, be justified. (*Arnold* v. *Angell*, 62 N. Y
r v. *N. Y. C. R. R. Co.*, 49 id. 42; *Porter* v. *C*
, 278.) The exception to expert testimony was suff
icit. (*Dilleber* v. *H. Ins. Co.*, 69 N. Y. 256.)

ohn E. Parsons for respondents. The diminution o
sable value occasioned by the wrong of the defen
verable by those who sustain the loss; in this case,
ntiffs. (*Francis* v. *Schoellkopf*, 53 N. Y. 152; *J*
hes, 67 id. 26; *Lahr* v. *M. E. R. Co.*, 104 id. 268
Pro. § 1665; *Campbell* v. *Arnold*, 1 Johns. 510;
v. *Freeman*, 12 id. 183; *Holmes* v. *Seeley*, 19
; *Wood* v. *City of Williamsburgh*, 46 Barb. 601; *E*
Noyes, 65 N. Y. 125; *Randall* v. *Sanders*, 23 Hu
N. Y. 578; Holt's Nici Prius Cases, 543; *Wright* v
Metropolis, 110 N. Y. 237; *Uline* v. *N. Y. C. &*
R. Co., 101 id. 98; *Pond* v. *M. E. R. Co.*, 112 i
plaintiffs were entitled to recover for the period fro
382, to May 1, 1885, notwithstanding that Mr. I
timer, their testator, died on May 30, 1882, having i
), leased the premises for a period commencing June 1

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jury assessed the damages in two separate sums, namely: F June 1, 1882, to May 1, 1885, the period after Richard M timer's death, covered by the lease to Gregg, $14,653.80, from May 1, 1885, to the commencement of the action J 28, 1886, $5,875.20. The trial court, upon defendant's mot set aside the verdict for damages, from June 1, 1882, to M 1, 1885. Both parties having appealed to the General Te the order setting aside the portion of the verdict at described was reversed and the balance of the verdict on defendant's appeal, affirmed. The defendant appeal this court from the judgment entered on the verdict affirmed by the General Term, and also from the o reversing the Special Term in reducing the verdict. principal question raised by the appeals is the right of owner of real estate to recover damages for an injury, suc was proven and found in this case, while the property wa the actual possession of tenants under a lease from such ow

Our decision at this term in the case of *Kernochan* v. *York Elevated Railroad* (128 N. Y. 559), disposes of question conclusively against the defendant's contention, it is only necessary to notice some minor points argued by defendant. The will of Richard Mortimer devised the estate in question to the plaintiffs, as executors and trust upon certain specified trusts for the benefit of his child It is contended on behalf of the defendant that the plain stand in the position of purchasers of the property after road was put into operation. If this view of the plaint relations to the property was correct, I am unable to see h it would affect the defendant's liability, since the recent deci of this court in the *Pappenheim* case (128 N. Y. 436). But while it may be true that a devisee in a certain general sense is a purchaser, it would be more correct to say that the plaintiffs, with respect to this property, represented all the rights that their testator could assert against the defendant before his death. There were no negotiations in reference to a purchase, as in other cases, where the price paid is fixed with reference to the existing situation, and all the burdens and disadvantages that the

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Statement of case.

PHŒNIX INSURANCE COMPANY, Respondent, *v.* WILLIAM H. PARSONS, Appellant.

The firm of P. & L. held an open policy issued by plaintiff, consisting of a cargo policy and annexed thereto a freight policy. By the cargo policy the insurance was "on cargo, freight and advances." It contained a clause to the effect that "the freight and advances insured under this policy are subject to the terms and conditions of freight policy attached." *Held*, that the meaning of this clause was not that the freight policy should control alone as to insurance on advances, but that to the terms and conditions of the cargo policy was to be added such of those contained in the freight policy as were pertinent and might concern the risk insured.

The "cargo policy" contained a clause to the effect that in case of any agreement by the insured whereby they relinquished any right of recovery against others, which in case of payment of loss by plaintiff would belong to it but for the agreement, it would not be bound to pay the loss. P. & L. effected insurance under the open policy for advances made to the captain of a vessel named for a voyage specified; before this they had written to the owners of the vessel that its captain had drawn upon them and asked whether the owners would remit the amount or would have them advance it. P. & L. after the insurance received an answer from the owners asking them to insure the advances if it had not already been done, so that in case of loss the owners would not be called upon for reimbursement. P. & L. replied that they had "covered the amount by insurance." A loss having occurred plaintiff, without knowledge of the correspondence between P. & L. and the owners, paid that firm the amount of the advances. In an action to recover back the same *held*, that said clause applied to the insurance in question; that the condition was broken, as the reply of P. & L. was an advice to the owners that their request as to insurance was complied with, and so the insurance became one for the owners' benefit, and P. & L. were estopped from asserting any claim against the owners for the advances; and, therefore, plaintiff was entitled to recover; that it was not material that the owners' letter of instruction was received after the insurance.

The amount of the insurance was $1,500, the sum advanced was $1,125. P. & L.'s claim against the owners was for $1,570; this included commissions of $341.63 for procuring a charter for the vessel. Plaintiff, with knowledge that the claim included the commissions, paid the whole amount of the insurance, taking an assignment of $1,500 of said claim; this the assignment stated was "for advances, commissions, etc." *Held*, that said commissions constituted no interest in or lien upon the vessel, and so as to this portion of their claim P. & L. had no insurable interest and it was not covered by the policy; that while the assignment did not

tions is released or lost, which would on acceptance of aban ment or payment of loss by this company belong to this pany but for such agreement or act; or in case this insur is made for the benefit of any carrier or bailee of the prop insured other than the person named as insurer, the comp shall not be bound to pay any loss, but its right to retai recover the premium shall not be affected." On Marc 1884, the defendants effected insurance, under their policy, for the sum of $1,500, "on advances on board the 'Elliott Ritchie' at and from Brunswick, Ga., to Buenos Ay

On March 27, 1884, the defendants had written to the ow that the captain had drawn upon them and requested ac whether the owners would remit the amount, or would defendants advance it. Under date of April 1, 1884, Boston owners replied to that letter and instructed defend in the following language, to "please get the advances insu if you have not already done so, so that in case of loss you not call upon the owners for the advances." On April se defendants acknowleged the receipt of the Boston letter say: "We have covered the amount by insurance out on Buenos Ayres."

The bark was lost upon the voyage, by perils insured aga and in August, 1884, the plantiff paid to the defendants amount of their insurance of $1,500, taking from them assignment of $1,500 of their "claim of $1,570, which have against bark 'Elliott Ritchie' and owners for adva commissions, etc., etc." Defendants also assigned to plai by indorsement upon the captain's draft for $1,125, all c on account thereof "in consideration of the amount insur advances on the vessel being paid." The assignment made upon the insistance of the company and their refus pay otherwise. Subsequently the plaintiff company sued owners in the United States District Court at Boston to rec the amount paid to the defendants in New York, alleging assignment of the claim against the owners. The trial upon an agreed statement of the facts, and, after hearing libel was dismissed. This action was then brought to rec

Statement of case.

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ubrogation be derived from the implication of
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h subrogation, is a complete or *pro tanto* discha
bility of the insurer. (Phillips on Ins. § 1712; 2
s. [4th ed.] 863; 17 How. Pr. 155; *Castell*
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and refused to pay without it, they were stand
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e insurance company would have been justified in
pay. (*A. M. Ins. Co.* v. *Storrow*, 5 Paige, 285;
Co. v. *Tyler*, 16 Wend. 398; 2 Phillips on Ins. 28
defendant's contention that the clause providin
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urance on advances, and that nothing except what
in the freight policy attached to the cargo poli
the question. This is untenable. (*Foster* v. *Van*
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ed warranty arising out of the assignment by the
hat the claim assigned was a valid claim to whi
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clause
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or lost
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warranty or agreement of the assured that the right of
gation of the insurer had not been and would not be re
or lost, by any action of the assured. Nothing in the la
of the clause we are at present considering imported an
tion of the terms of the cargo policy from the cont
insurance.

In the next place, the condition in this cargo policy, r
to any release or loss of the right of recovery agai
owners, was clearly broken by the defendants. Whe
acceptance of the captain's draft for disbursements up
bark, the defendants effected the insurance for their ad
with the plaintiff, they were without any instructions fr
owners. Those instructions came a day or two afterwa
the letter of April first, and requested the defendants to
their advances, so that in case of loss they would not ca
the owners for reimbursement. They replied that th
"covered the amount by insurance out only to Buenos
This was a plain advice to the owners that, to that ex
voyage, their request as to insurance had been complie
The result was that the insurance effected became one
owners' benefit, and, in case of the loss of the bark, any
received from the insurer would go in discharge of the
edness of the owners; or if none were recoverable fr
insurer, for any cause attributable to the defendants or
claim against the owners was, nevertheless, gone. The
thenceforth estopped from asserting any claim agai
owners for advances to the bark; for the owners were j
in relying upon the defendants' representations in reply
instructions to insure, and in believing their personal
released and the claim transferred to the insurance. I
no consequence that the insurance was effected bef
owners wrote their letter of instruction. By the corr
ence of the parties, the agreement was established th
insurance should be for the owners' benefit and their p
liability released. Nor is it material that the defendan
not have realized the effect of their reply to the owner
of instruction. The question is, what had the owners in

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ecified the defendants' advances as the subject of
ut the assured had no insurable interest in the
anything beyond what the term advances might
nclude. That was the defendants' only interest at
e voyage. The insurer's contract was to indemnify
t any loss in respect thereto, during the voyage,
rils or sea risks specified. This plaintiff, therefore,
lefended against any claim for the $1,500 written
olicy.

the formal assignment by the defendants to plain-
e indorsement over of the captain's draft, affect
n? Obviously, no claim for the advances passed.
al claim for that against the owners had been
the assured. It was not necessary, as the General
r considered, that the right of the plaintiff to
k the moneys paid upon the policy should rest
nplied warranty in the defendants' assignment to
se of action was perfect, independently, for it
yment in ignorance of the defendants' breach of
n. And the force of that condition was quite as
l of a recovery back of the moneys, paid in ignor-
fact that the defendants had forfeited or lost their
enforcement of the owners' personal liability, as it
been to defend against a claim for payment, if the
been made aware of the breach of the agreement.
ip.e of the equitable right of the insurer to subro-
discussed in the opinions delivered by the vice-
nd chancellor in the case of *Atlantic Mutual Ins.*
row (1 Edw. Ch. 627, and 5 Paige, 294), and
o them may be had. The insurer could not be
that subrogation to the right of the assured, which
quity and the loss of which was especially secured
, in the contract of insurance.

nk the deed of assignment did have the effect to pass
plaintiff whatever claims the defendants had against
growing out of the transactions disclosed here.
500, paid by the plaintiff for the assignment, it

ion of the Court, per Gray, J.

ecome the owner of such of
l, as were still owing to the
ommission for procuring a cl
ment read that it "assigned $
which we have against bar
lvances, commissions, etc."
n's draft was assigned over by i
the information that the su
d been advanced for disburse
tiff, if it did not actually know
ledge, or was put upon its i
gainst the owners for other ar
Of course, the plaintiff supp
to all the claims against the
ect of the assignment was gone
owners for reimbursement of t
aid that the assignment was i
he claims? They became th
e and I can see no reason wh
eable *pro tanto*.
or in admitting the record of
, in the action between this
ark. It proved a judgment,
diction of the subject-matter
he libel, filed by the plaintiff
ark, to recover the advance
d which it supposed it had a
n the original debtor. The
the same material facts as her
of the fact of a judgment di
ignment purported to transfer
v. *Fourth Natl. Bank*, 89
the General Term of the ju
the counsel fees in the Bosto
Had these defendants beer
would have been different and
ay that item of damage. As

what doubt that any notice was due them; for the p was not defending an action, but was suing as the hold claim, by the right of subrogation and by virtue of an ment. However, the reduction has not been made the s of an appeal. But as to the actual costs, which were p that action, I think it right that the plaintiff should r them. The suit certainly was the natural sequel, or quence, of the defendants' act.

No other point of the appellants demands our consid and I advise that the judgment, as entered upon the o the General Term, should be further modified, by ded from the amount of the original judgment herein, which shall be equal to the difference between the s of the verdict of $2,353.11 and an amount made adding together the sum of $1,125, advanced on th tain's draft, the commission thereon of two and o per cent, and interest on these two sums at six per cen March 25, 1884, to the day of the trial, and the sum of costs of the Boston suit, with interest thereon at six pe from October 1, 1889, to the date of trial, and that the ment as so modified be affirmed, but without costs to party as against the other.

All concur.

Judgment accordingly.

133-133
136-513.

ANTHONY J. DREXEL et al. *v.* ELIZA A. PEASE, as Exe etc., et al., Respondents, THE MECHANICS' NATIONAL et al., Appellants.

P., a merchant doing business in New York, and St.A., a merc France, entered into a contract which, after reciting that D., the ow packer of a certain brand of sardines was willing to give them the m thereof, stated the agreement of the parties to be that they were to eighty per cent of cost of each invoice as forwarded from the fi each to advance one-half; the sardines to be shipped to P. and s the net profits to be divided equally between the parties and pursuance of the contract, sardines were shipped to P., who borr plaintiffs, a firm of bankers, the forty per cent agreed to be adva him. P. failed and made an assignment for the benefit of c reditors. D.

L et al. v

Statement

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CXXIV

ppellants. On the vita
lebtedness and identity
proceeds of goods shipp
vidence whatever. (*D*
nl. on Ev. §§ 436–43
n Ev. 154, 155.) Th
d the power of the
or in dismissing our a
interlocutory judgmen
l all proceedings under
. (Code Civ. Pro. §§ 1
ngs and his proof there
rn, 2 N. Y. 506, 507;
E. Bank v. *Eames*,
Delafield, 25 N. Y. 266
602, 605; *Arnold* v. *A*
layor, etc., 84 id. 296,
3; *Southwick* v. *F. N*
, 12 id. 9; *Bryant* v.
Co., 30 Hun, 375; *I*
ann v. *Fairchild*, 3 Al
rich, 40 N. Y. 511; *D*
; *Romeyn* v. *Sickles*, 1
) The banks are entitl
eds of merchandise in I
Ex parte White, L. R. [
1 Barb. 650; *Bonestee*
O'Neil, 6 Daly, 307;
partnership in relation
(*Richardson* v. *Hug*
on, 7 Hun, 425: *Osbrey*
30; *Euger* v. *Crawford*
550; Bates on Partner
. 33; *Cassidy* v. *Hall*,

ts. The banks and assig
ney can only reach Pea

vhich he advanced to St. Amant under the agr
y claimed a bankers' lien upon the goods and tl
›y virtue of the advances to and arrangeme
which has been found. The plaintiffs brou
o enforce this lien and made the attaching ba
› of Pease, and St. Amant parties defendants,
›d. In the meantime, with the consent of the
'er was appointed in the action of the fund re
collected accounts and the proceeds of the goo
en attached and subsequently sold. The case
'ought to trial at Special Term, an interlocuto
as entered directing the receiver to pay to the
ı of $4,264, with interest thereon and costs ou
satisfaction of their lien, which was adjudge
l of the plaintiffs' interest in the controversy s
defendants now seem to raise any question a
the judgment. The court, however, did not t
ıe conflicting claims to the rest of the fund by S
one hand and the banks as attaching creditor
›ut a provision was inserted in the judgment p
ference to ascertain the particular portion of tl
›roceeds in the receiver's hands received by Pe
ıt under the agreement, and also whether tl
obtained by the banks against Pease were for
debt due from him or for advances made to
. of the business under the agreement throug
ds came from St. Amant, and that all other q
ı the defendants be reserved until the coming i
ıpon the reference. From that part of the ju
g a reference the banks and the assignee app
ıeral Term, but the appeal was dismissed. The r
.ed and the referee reported that all the goods a
ls that came to the hands of the receiver were
ıse from St. Amant under the agreement and
s collected were for the purchase of like go
ıad received and sold under the same condition
ebtedness of Pease to the banks was on his in

fifth inst., is duly at hand. I had
ter (Dumagnou) and owner of th
ng to give us the monopoly of these
e as follows:
80% of cost of each invoice as they
tories, this advance to be halved by y
take the amount of 1,000 of Amer
100 low ¼s, to be handled during th
erty of stopping shipments and a
any time during the season, if w
e any other good reason.
n on the account of 6% per annu
harged by us nor profit to be added
kerage only when actually paid by
d from wharf, unless some very goo
ing otherwise.
ioned by failure of your buyers to
ne-third each by you, the owner of t

net proceeds of all accounts sale, c
, shall determine the profit of the season,
ded in thirds in same manner as stated in
h. If this should show a loss, this loss is
er.
t 500 cases of tins cut to size of old Ameri-
be sent on first, in order to get as many in
he four per cent duty.
e foregoing, you will see that we are entirely
the result, and without my knowledge of
rdness and business integrity through many
ver have suggested you to my friend here.
r early answer, and I trust this will lead to
ger business way between us."
f St. Amant does not import a contract of
rt below held, a joint enterprise between
and the packer Dumagnou, for the ship-
rdines and after payment of advances and

ed to pass upon any
ike out any impro
referred to, carried
d every paper that
of the case we cann
urt that the fund w
St. Amant to Pease
e. On the contrar
ence sufficient to
der of reference i
raised at the trial
irregularity or wan
the referee was b
took the chances
n the report which
thout any objection
orable report from t
e interlocutory jud
Under these circums
trial proceeded wit
r the reference was
t we think the cour
e last clause of sect
h a case as this to or
dings upon one or n
e issue." The othe
hear, try and deter
the court to refer o
determine, but to
art. That is all tha
n was not bound by
uld adopt the findings or from
s. On the whole we are of
was committed in the disposi-
the judgment and order should

able by local assessment. (*Jex* v. *Ne*
Keese v. *Denver*, 10 Col. 112; 5 I
d ed.] 800; *In re Garvey*, 77 N.
0 id. 165; *In re Smith*, 99 id. 424;
'al. 97; *People* v. *City of Brooklyn*,
ılligan v. *Smith*, 59 Cal. 206; Cool
Porter v. *Hill*, 9 Mass. 34; *Cripp*
; *Ruggles* v. *Nantucket*, 11 Cush. 433
N. Y. 615; *Van Rensselaer* v. *Wit*
Golden, 35 id. 462; *Westfall* v. *Pre*
Suffern, 68 id. 325; *Bellinger* v. *Gr*
v. *Ward*, 58 id. 402; *Brevoort* v. *B*
ach v. *Hayes*, 58 How. Pr. 17; *Hinc*
253; *People* v. *Hagadorn*, 36 id. 6
37 id. 170; *Springport* v. *T. S. I*
75 id. 397, 406; *People* v. *Batchell*
Genoa, 23 id. 439–450, 452; *Craig*
en of Ontario v. *Hill*, 99 id. 324–32
9; *Thompson* v. *Harvey*, 4 H. &
the proposed law was insufficient an
the statute. (*In re Orange Street*
nold v. *Cambridge*, 106 Mass. 352;
Hun, 10; *In re Van Buren*, 79 N.
etown, 98 Mass. 583; *In re Grube*, 8
Mayor, etc., 35 N. J. L. 404; *Sewell*
9; *Rathbun* v. *Acker*, 18 Barb. 393; *Kankakee* v.
19 Ill. 324.) No grade or level having been estab-
fore the passage of the law for this improvement, the
id. (Laws of 1890, chap. 290, § 1; Laws of 1876,
3; *B. P. Church* v. *Mayor, etc.*, 5 Cow. 538; *Peo-*
olice Board, 6 Abb. Pr. 162.) The law passed by
non council was void for the reasons that it failed
the petition and its requests, and also the clerk's
its pendency before the common council. (*People* v.
Brooklyn, 14 Abb. [N. S.] 118.) The notice for
.1, 1881, is defective in form and substance, and was
ıtly published and, therefore, conferred no jurisdiction

D. & H. C

nt of case.

4; *Peopl*
id. 338; 1
. Paul, 2
People v. .
115; *State*
n. [2d ed.
Gleason, 1
38; *In re*
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m, 20 Hu
Van Bure
617; *In*
5; *Spence*
oceeding,
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ord, 78 id

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e proceedi
ed. (Law
. 20; *Wh*
184; *Hou*
id. 235; .
yor, etc.,
ase v. *Ch*
hapter 29
the defe
efects wh
ctional in

ous proceedings were had by the city
assessment and the contract for the
ınd, at least, an attempt was made t
uisites of the statute in order to make
ed all these provisions were not sub
ınmon council confirmed the assessm
October 17, 1881. This was the situ
the Laws of 1883, entitled "An act
ınent of the city of Albany," was
was substantially a new charter fo
ıged and consolidated existing law
ew and important provisions in rega
and the methods of procedure for
of the same. These provisions are
ctions of title eleven. Section one
ıent that may hereafter be levied sha
ıted by any court because of a failur
tor to comply in the execution of th
ments of law, or the contract in respe
. in the same section provisions autho
erty owner liable to be assessed for t
lings against the contractor in the co
nance of the contract, to prevent fra
n to be paid to such contractor in c
concludes with these words: "And a
levied in the city of Albany, pro
or set aside which were not pending
eby validated and confirmed." It is
lings were pending at the above date
ıside this assessment. The second an
ows:

. If in the proceedings relative to
ıents for local improvements in the
proceedings to collect the same, any
rk, or substantial error, shall be alleg
ommitted, the party aggrieved ther
ıe assessment vacated or reduced, or

d by the last paragraph of section
f 1883, which declared the assessme

s the only question in the case, it mi
ss the point upon which it depends
s legislature under the Constitutio
is character. This question has ofte
ussed in this court, and as we are o
another question which is fatal to t
eeding, we do not think it necessar
r, to pass upon the effect of such
ur case.
that the county judge had no jurisdic
nt nor to entertain the proceeding
the General Term properly reversed h
ever jurisdiction the county judge
ents like this is conferred solely b
le 11 of the act of 1883. It is not
such jurisdiction prior to the passag
tion is whether such jurisdiction as is
ction applies to and embraces asses
d confirmed eighteen months prior to i
third sections in terms apply only t
nade." The scope of the second
t appear to be expressly limited by
f the position that it occupies in the
nd connection with the other sect
e that statutes are to be construed a
e of some words manifesting an i
gislature to give them a retroactive
t that it was the intention of the l
v jurisdiction to future assessments o
111 N. Y. 59; *In re Van Kleeck*,
Bennett, 24 id. 20; *Whitney* v. *Th*

three sections referred to contain,
visions which show very clearly th

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15, 1883.
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ıw, Appellant, *v.* MILES BROADBEN

ient for a party, who sets up a prior jud
ecord showing a judicial determination i
litigation; he must also show that the
the merits, that the question was a n
on, and that it was disposed of upon sub
presented in the subsequent action.
o enforce the specific performance of a pa
ese facts appeared and were found: That
ıouse on a lot owned by him and to conv
$1,200, to be applied on an account pla
The house was built and possession give
tinues in possession thereof. Plaintiff
gainst defendant on the account without c
ıent was issued therein, under which de
pon. The attachment was vacated and the
an action upon the undertaking, given wi
o recover his damages. In her answer in t
up the said contract as a defense, and dem
nises in accordance therewith. No reply
that action, the counsel of the defendant
ered to prove said contract; this was obje
lence excluded, the court holding that the
ıe action upon the account was to wai
erein having elected to sue for the mone
ıd taking the land. The court, in the acti
ıd that said premises were the property
therein, that none of the allegations of
ned, and rendered judgment in favor of
s. Thereupon the plaintiff here, in he
oved for leave to amend her complaint by
o the contract and giving the credit.
the court stated, without passing upon o
ıether such an agreement was made, and
the decision and adjudication in the action
ghts of the parties. The complaint wa
the defendant answered denying genera
ting up the judgment in his favor. The
t the alleged contract was made; that de
gave possession thereof to plaintiff, and
laiming to own it, with the understandi
defendant with $1,200 on account. Th
fied the account in full, and a judgmen
efendant, dismissing the complaint. I

the Court, per RUGER, C

, 60 N. Y. 278.) Th
. Pro. § 191.)

s action was brought
rformance of a parol
to convey land to plai
defendant, which was
The evidence was nc
s determined upon th
findings the case must

t should have been th
and it is our duty to c
f fact require. Amor
court: "That in the
en the parties hereto
rnished and to be furni
to be rendered by pla
g to build a house o
e of Holly, being the
plaintiff's complaint h
pplied at the agreed
rowed money and oth
iff, and plaintiff agree
efor as aforesaid."
t did build a house on
reof, who has ever sir
ssion thereof."
ed to decree the speci
e ground that upon
ies the question in cor
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this action.
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contrary effect had been rendered, and

of the Court, per F

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100 damages and
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the plaintiff ag
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t credit to the e
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ade, and without
udication in the
nts of the parti
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olly denying the a
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others, made
s indebted to pla
nt of $4,113.25,
ch, at different ti
ie summer of 1880, an arrangement was

ears was asked, and permitted to answer
question as to within what time and s
opped. *Held*, no error; the court, howe
s barely competent, and that this class
raged.
t refused to charge that the railway co
street, had the right of way and the s
h the driver of the truck was bound t

ng to the cars of a street railway corpor
for right of way in the street where its t
to streets crossing the railway; at suc
hts superior to those of vehicles moving i
urt charged the jury, requests to cha
the respective parties, which it charged
truck owner then made further req
Counsel for the railway company made
ceded to. Counsel for the truck owner
ich the court declined to hear or receive.
ounsel may not unreasonably prolong a t
eases, or by debates to the court or the j
erminable requests to charge.
McCormick (86 N. Y. 479), distinguished.

tober 21, 1891; decided December 1, 189

rom judgment of the General Tern
e city of New York, entered upon
91, which affirmed a judgment in
n a verdict of a jury and orders den
a new trial.
re of the action and the facts, so
the opinion.

Scribner for the Dry Dock, Eas
ilroad Company, Appellant. I
tion against the defendant the
nd Battery Railroad Company. (
Co., 38 N. Y. S. R. 254; *Flecke*
Co., 105 N. Y. 655; *Donnelly* v.
Fenton v. *S. A. R. R. Co.*, 36
25.) The omission of the car dr

nd the car were proce
parties were equal.
. 460.)

ith for respondent.
e complaint. (*Barr*
Creed v. *Hartmann*,
d. 63; *Dobiecki* v.
., 79 id. 464, 468; *I*
; did not error in a
quickly, or within how
the circumstances sta
R. Co., 36 Hun, 25
court below was cor
oad company had the
or right to the truck
Co., 53 Hun, 571; *
er v. *S. A. R. R. Co*

, 1889, while the plai
of the defendant c
between the car and
rought this action to
that they were cause
efendants.
; now to detail the ci
plaintiff. A careful
t upon our minds tha
ligence of both defen
proved by the Gener
e, we have only to co
the defendants, or eit
ror.

ng the injury of the plaintiff took place
ssing and the truck was going up Broad-
the plaintiff and of the railroad company
f the truck was negligent because he did

in the streets. As the cars
nnot turn out for vehicles dr
e preference and such vehicle
e manner, keep off from the
free and unobstructed pass
an street railways be operate
ays have the paramount right
d prudent manner. But a r
n a different footing. The ca
cross the street, and the vehic
cross the railroad track.
e other. The right of each m
the right of the other, and th
in a reasonable and careful m
ridge or interfere with the rig
had charged the jury, the c
g was proceeding to ask the j
the judge said to him that
requests from him, and to t
ow claims that his client's ri

In *Chapman* v. *McCormick*
the legal right of counsel on
ropositions bearing upon the
ne court to instruct the jury
lenial of such right is the su
w upon appeal. But the fa
thin the rule there laid down
nced the decision in that case.
ced his charge, the counsel fo
to him requests to charge,
l to charge such requests. A
arge and passed upon the req
fendant Westing made a fur
udge asked him if he had "a
is all I wish for that." The j
n he made another request
request in a manner satisfacto

; *Jessen* v. *S*
ay, 161.) P
People v. *B.*
ki, 68 id. 88.
eculiarly a p
3; *Allen* v.
of a common
onfer a vested
on for all t
, 577.) It c
olic nuisance,
lic travel. (
If the awni
t, as matter o
lewalk, the th
nd unlawful
nal Board, 5
; *People* v.

d J. Dean fo
vo public offi
luty which t
ined. (Laws
Society, 75
v. *Dwyer*, 90
2 id. 505.)
n on a pub
v. *Cross*, 3
Vanderbilt,
1; *Moore* v.
v. *Jackson*,
, 5 N. Y. Su
3; *Ely* v. *C*
. *Mayor, etc.*
[N. C.] 123;
. *Smith*, 41
Emmons v.

it the power to authorize their
n compliance with the rules
is just as clear that the legisl
e common council to permit t
it is that it intended to prohib
roachments upon or obstructi
was an obstruction that was inte
eneral prohibitive words, or pe
that the legislature did not int
d cover that particular case. W
istinct provisions, one being sp
do a particular thing or permi
neral, prohibiting certain acts w
clude the particular thing auth
eral prohibitive clause does not

When a general intention is expressed and also a
ıtention incompatible with the general intention,
ır intention is to be considered in the nature of an
(*Churchill* v. *Crease*, 5 Bing. 178; *People ex rel.*
, 99 N. Y. 83, 89.)

ı view these general rules of construction we have
ıt the common council had power to authorize the
maintenance of the structure in question, and it
r to see whether this power has been exercised.

0th of May, 1886, the board of aldermen and
ıncil of the city passed a general ordinance, after
returned by the mayor without his approval, "to
: erection of awnings extending across sidewalks
ı the city of New York," the material part of
ollows:

1. Awnings of tin or other light metal or canvass
:ted across the sidewalks of any of the streets of
New York, except Broadway, Fifth avenue, Lex-
ue and Madison avenue, provided any and every
shall not be higher than the floor of the second
building, the first floor being the ground floor, but
to be covered with wood; and every awning or

neys. (9
ty. (Por
al Term
ddressed
§ 724; *S*
id. 365;
. Graha
; *Scovill*
42; *Bec*
. 134; *G*
2 id. 569
s, and the
nk v. *H*
); *Bonyuge* v. *Waterbury*, 12
52 How. Pr. 325; *Reeve* v.
v. *Steinan*, 58 id. 315.) Sec-
rence to such an application as
5 T. & C. 37; 42 Barb. 550.)

ority tending to support the
greement of March 24, 1890,
ent by the defendants to the
extent specified in the agree-
efendants against Lippincott.
Y. 108; *Williams* v. *Ingersoll*,

s been defined to be such an
ee a title which, although not
cognize and protect. Such an
equitable interest in the sub-
to the creation of the interest
nforceable by suit for specific
rest assigned. Whether in a
nts to an equitable assignment
n the intention. Where the
written agreement, it depends
s as manifested in the writing,

it of such extrinsic circumstan
law are admissible in aid of t
nstruments. It has been sai
assignment there must be suc
ject-matter as to confer a co
he party intended to be provid
tances do not admit of its
E, J., *Christmas* v. *Russell*, 1
btedly be a purpose to pas
erest may be absolute or quali
assession and enjoyment, or a r
ed until the occurrence of s
rds, the assignment may be m
tions and qualifications, such
eyance or assignment of the le
The quality of the equitable es
the parties intended.

the agreement of March 24, 1
tion on the part of the defend
itable interest in the subject o
nstances confirm that constru
d and perhaps doubtful. The
arry on the proposed litigati
easonably have expected to r
ervices and disbursements, exc
which might be recovered in
their part agreed to conduct
ar as lies in their power to car
a successful and final issue an
agreed that the plaintiffs "s
recovery of said claims" (aga
entage of "such recovery or s
ts reserving the right, "withir
onable cash fee" for the ser
e of such proportionate part o
for as before provided. The
provides for a division by tl

e Court, per Andrews,

nts of all stock, ca
fter the plaintiffs sh
agreement, and it i
shall cover all disbı
ay the plaintiffs out
agreement in effect
ns, and that when ı
n the parties in the
d to the defendants
compensation in ki
greement as execut
equitable assignmen
ould divest the equi
ıe claim and operate
the plaintiffs were ec
no means establishe
he consideration of
render the service
the agreement on
o perform it, and p
by the act or condu
o standing in a co
rformance of the ag
for the agreement
was the promise of
ed. The performan
and non-performanc
ıt. It is well settle
formance in equity
" performance, or at
part." (*Gray* v. *M*
; *May* v. *Schuyler*,
the plaintiffs did n
conclusive here un
tends to show that
voluntarily abandon
l for the defendan

eiture of any rights under th

to the refusal of the referee
the pleadings so as to introdu
quantum meruit, was not well
denial of the court of the pla
for the introduction of further
reviewable here.
should be affirmed.

rmed.

RTON, Respondent, *v.* MORITZ B
Appellants.

anty and of quiet enjoyment or against
ken by a mere trespass, not amountin
ut claim of right on the part of the t
pass, conceded to have been without
s contracted to be conveyed, furnishes
he part of the vendee to complete the
l to sell and convey to defendant B. c
tgage thereon to secure part of the
ontract to defendant C. to whom plain
subsequently conveyed them to B. A
eet railroad encroached upon the prem
tional and grew out of uncertainty as
B. required and plaintiff executed t
l a covenant to have the railroad comp
essee a lease of the land occupied by its
lso to indemnify B. "from all loss or da
croachment of the tracks, * * *
ure transaction in respect to said lands
y opened with the company for a l
he thirty days, the limitation of time,
3. The tracks were subsequently rem
d to sell said lands at an advance of
e the mortgage, defendant set up as a
contract of sale, alleging that his ven
covenants of warranty, of quiet enjoy
efused to perform because of the en
r the $36,000 as damages for breach

atement of case.

did not assume the
Bauer's counsel showe
ıpany, and on the day
delivered to Bauer fr
acknowledging the
and unintentional char
on thirty days' notice,
which he accepted t
to removal on thir
with this and at his
n writing containing e
the opinion, in which

ige for appellants.
e v. *Talcott*, 96 N. Y.
3.) Assuming that
ars by certain and con
fit" of at least $6,8(
Woodgate v. *Fleet*,
trial judge put his de
; 71 N. Y. 118; *Pe*
on Dam. § 191.) Th
ıove the tracks is not
eau, 38 N. Y. 111; *J*

respondent. The app
or loss of profits oth
oteau, 42 Penn. St.
Wilson v. *Holden*, 1
N. Y. 66; *Margraf*
Co., 90 id. 29; *O.*
bert v. *Wiman*, 1 N.
Selover v. *Harpendi*
tlage, 72 N. Y. 267.)
e of the tracks on th
ıon the appellant Ba

Statement of case.

Y. 490; *Kearney* v. .
; *C. M. Co.*, 39 Hun, 4
Abb. [N. C.] 121; 10
, 8 Hun, 424; *Elwoo*
responsibility for the d
ed upon the appellant
lay which he himself
26; *Gee* v. *Pearse*, 2 I
Hun, 285; *Granger* v.
, 96 U. S. 244; *Ins.*
r plaintiff and respon
ed by appellant Bau
to pay interest to Ho
K. L. Ins. Co., 63 N.
l Borger contract migh
to notify plaintiff or t
as to save or diminish
N. Y. 97; *Wright* v. .
on v. *Anderson*, 43 i
76; *Gray* v. *Fowler*,
l Borger to complete
use trifling objections
(*Winne* v. *Reyno*
. Perf. § 415; *Guyne*
l performance of the i
is all that the law ex
Y. 211; *Nolan* v. W
, 50 id. 145.) Borg
le, if perfect, at time o
f Bauer to sue him is
contract. (*Viele* v. *T*
Church v. *Mott*, 7 P
55, 359; *Hepburn* v.
ls, 6 Paige, 407; *Dr*
was entitled to a reaso
ection to the title. (
no defense to this fore

had been instituted for one corne
Willis, 81 N. Y. 280; *Yonk* v. *Al*
ush, 39 Barb. 661; *McConihe* v. *F*
e v. *Tallman*, 20 id. 191.)

The counter-claim asserted by
two facts: one, the contract of
plaintiff relative to the encroachme
pany upon the lands agreed to be p
alleged failure of a later and n
veen the defendant and Borger for
hich failure was traced to the pr
it. There is no doubt that at the
tracks of the railroad were in fac
ontroversy, and to the knowledge o
nt; but the trespass was unintenti
ng out of uncertainty as to the lines
ut any claim of right, and ended
he rails. How a damage of thirt
o result to the defendant from this
ever challenged his title or right o
the two contracts, in the first of w
lee, and in the second an apparen
owing of the encroachment at the
urchase, he required to be executed
r the covenant upon which the co
sts, and which is as follows: "I he
ithin thirty days hereafter either
said railroad of a lease of said premises in a form
o Moritz Bauer (containing the privilege of the
ver possession of the premises upon thirty days'
have the tracks of said railroad company entirely
m said lands. And I hereby expressly covenant
indemnify and save harmless the said Moritz
from all loss and damage which may arise from
ment of the tracks of said railroad company upon
cluding loss of profits in any future transaction in
d lands."

f the Court, per Fi

was dated May
th parties on
several times
l of August. (
to the vendee
lly acknowledg
al and uninten
racks upon thir
r by which he
noval on thirt
ory to the defen
nd who require
f indemnity ab
ccepted the titl
y the vendor fo
thirty days und
waiver of time

act. But duri
ack was remo
rger for the sal
ousand dollars.
intimate friend,
ent or the exis
im to discover i
re were other s
tle tendered, he
ie sole ground o

ve held, upon a
nsaction, that th
y to furnish a ba
not made in
hat conclusion,
ence of that con
nd no real or ac
pported by the
contract was on

es of profits was involved.
itly to indemnify and save
ut upon the defendant of es
l and legitimate consequenc
the alleged loss from the
as ineffectual for two reasons
contract. An accidental tre
ut title and without right,
be conveyed, furnished no
d would have been no defen
nance. If he had taken fro
ne of the covenants would ha
them could have been ma
in fee and full right to conv
nd for quiet enjoyment is nc
mounting to an eviction. A
lies for its basis some outst
Bauer's deed to Borger, if a
er everything which the con
ing in the accidental and ad
nduced a court of equity to r
this, conceded by appellant f
be a possible truth, is met
to assign his contract to plai
e it, who declined the offer.
answer. No such duty dev
plaintiff. The transaction w
plaintiff was in no manner r
interest except that it shoul
nducted and enforced. The
that enforcement was impossi
ound fairly to prevent or
is indemnity. If he desire
e for the results of the litig
to let him conduct it or aid
of the contract the plaintiff
t. The damages, therefore,

l bad faith of the defendant. He permitted the
s contract with Borger and abandoned it without
l without reason.

er to be remembered that if Bauer had sued Borger
pecific performance the former could have removed
fectly able to have ended the encroachment, as it
nded, long before his action could have come to
rfect and flawless title then would have commanded
performance. (*Jenkins* v. *Fahey*, 73 N. Y. 355.)
nduct of the defendant, who abandoned his legal
e right in order to make a loss, and omitted an
to protect not only himself but his indemnitor,
h the other facts and circumstances of the case,
zed the courts below to determine as a fact that
contract and the alleged loss of profit were alike
l collusive and not actual and honest. Those con-
ing upon sufficient evidence, are decisive upon this

nent should be affirmed with costs.

r.

. affirmed.

Blakslee Manufacturing Company, Respondent,
. G. Blakslee's Sons Iron Works, Appellant.

135-92
135-455
138-42

129 155
144 84
129 155
157 580

onvey lands under water of navigable waters conferred upon
loners of the land office (1 R. S. 208, § 67, as amended by
aws of 1850) only authorizes a conveyance to the owners of
g upland; the right or privilege to apply for and receive
ace is appurtenant to the upland and vests in the owner
can never exist severed from such ownership

re, the owner of upland on the Hudson river conveyed the
l containing an exception of all the water rights and privi-
iver appertaining to the premises, *held*, that the exception
neffectual as such, or as precluding a subsequent owner of
rom claiming title to the land under water under a patent
e issued to it as such owner.

the state is not assailable collaterally, unless void on its

Statement of case.

m in the act of 1850 (Chap. 283) that a
to any person other than the owner of
e construed as subject to the settled rule
atent is requisite to establish its invalid
rect proceeding to review the action of
in equity to vacate the patent.
w, 59 Hun, 209.

tober 23, 1891; decided December 1, 18

rom judgment of the General Ter
e second judicial department, ente
ıary 12, 1891, which affirmed a j
entered upon a decision of the
ıout a jury.
an action of ejectment.
, so far as material, are stated in

Larkin for appellant. The Jone
d by Phebe M. Bunting to the pl
ı rights. (*People ex rel.* v. *Jones*
S. R. 642; *Beach* v. *Mayor*, e
sey v. *N. Y. & N. E. R. R. Co.*
. *Shultz*, 116 id. 382.) The gra
aintiff is void upon its face. (1 R
le v. *Schermerhorn*, 19 Barb. 5
id. 382.) In an action of ejectn
d for success on the strength of l
case on the weakness of his oppo
24 N. Y. S. R. 28.)

Taylor for respondent. Ejectme
C. & S. L. R. R. Co. v. *Valentin*
ff having proved its title from
, was entitled to judgment, and d
he complaint was properly denied
; *Brady* v. *Begun*, 36 Barb. 5
N. Y. 210.) The alleged title
itle whatever vested in defendant
F. Co., 68 N. Y. 71; *Gould* v.

Plaintiff's title to upland adjacent to the grant

unter patent, assu
known monumer
ng this starting p
of the premises in
Hunter patent.
thereby as land u
pposite to his (I
, in the county
take at high-wa
It is clearly sho
e Sing kill, and
was adjacent t
nter never occu
hat he and his
the land unde
the part now
nally the eviden
g point of the Hu
efendant, and in
s of the grant w
sy. This dispos
nt.
be considered.
, conveyed to Wil
rth of the Sing
he village of Sin
Water street to
following the g
words: "Excepti
his heirs and ass
the water grants
said railroad, wh
g to the above-de
nner as if these
has succeeded t
xception, and is
of the Gregory s

ıion of the Court, per Andrews,

ɛt up by the defendant und
ɔy of the lands under wate
.h lot cannot, therefore, pre
nt attacks the plaintiff's title
st, that in fact the land emb
mby to Gregory and Smith
r below high-water mark,
t of 1889 was void as not hi
adjacent upland; and *sec*
o the lands owned by it a
ler water embraced in the
ɔf the premises owned by
ıe lands in controversy, a
ı had, are outside of the lin
ɛ confined. It is a conclusiv
ıs that a patent from the stat
void on its face. The declara

t made to any person other t
be void," is to be construed
here evidence *de hors* the p
validity, it can be avoided
iew the action of the com
) vacate the patent. This p
ong line of authorities and
ess. (*Jackson* v. *Lawton*, 1
ɜn. 389; *People ex rel. Bu*
hrhardt v. *Hogaboom*, 115 U
Vall. 83; *French* v. *Fyan*
Co., 106 id. 447.)
1889 is valid on its face
been executed to the own
ıs, in fact, true cannot be

or in the judgment and it

med.

ELLS, as Treasurer of Excelsior
of the Knights of Labor, Respo
. MONIHAN et al., Appellants.

e Statute of Frauds cannot be made a
aded as a defense or presented by the av

the charter of a local assembly of the Kn
the property rights of the association as
nor does it destroy the right of the as
ent it or vest its property in any superior
n an action brought by the treasurer of su
ry note given to it, *held*, the fact that the
en revoked was not a defense.

· 28, 1891; decided December 1, 1891.)

judgment of the General Term of
ird judicial department, entered u
r 25, 1890, which affirmed a judgm
ered upon the report of a referee.
as brought by plaintiff, as treasurer
4120 of the Knights of Labor,
n incorporated association, to reco
ument:

"AMSTERDAM, N. Y., *Nov.*
ned, promise to pay, 6 months af
which was received by the Loca
., from Excelsior Assembly 4120,
20, or their treasurer.

"E. H. MC
"JOHN S'

r was an unincorporated associatio
hat is called a warrant and charte
embly of the Knights of Labor. I
, 1887, a circular letter was issued
oard stating that they had revoked
appear in the opinion.

oard J. Meegan for appellants. The paper up
ction was brought is void by the Statute of I
by its terms to answer for the debt, default o
of another, no consideration being expressed in tl
itself. (4 R. S. [8th ed.] 2590, § 2; *Castle* v. *B*
m, 343; *Drake* v. *Seaman*, 96 N. Y. 230; *B*
e, 118 id. 580; *Chaffee* v. *Thomas*, 7 Cow. 358
adley, 2 Hill, 584; *Considerant* v. *Brisbee*,
87; *Draper* v. *Snow*, 20 N. Y. 331; *Knox* v
213; *Clark* v. *Hampton*, 1 Hun, 612; *Br*
e, 8 N. Y. 207; *Hill* v. *Blake*, 97 id. 216; *I*
er, 19 Conn. 7; *Jeffries* v. *Hager*, 18 Mo. 27
e erred in holding, as matter of law that the pla
eal party in interest and could maintain this
rer of Local Assembly No. 4120 of the Knights
Civ. Pro. § 1910; *Schmidt* v. *Gunther*, 5 D
n v. *Hatch*, 109 N. Y. 598; *Hyde* v. *Woods*,
Local Assembly No. 4120, or the plaintiff, m
ht an appeal to the general assembly but did
ssly waived the right to do so. Remedies pro
constitution should first be exhausted before re
s of law. (*Lafond* v. *Deems*, 81 N. Y. 514;
v. Lincoln, 129 Mass. 70; *Fisher* v. *Raab*, 57 How. Pr.
The legal effect of the unreversed action of the general
tive board was to deprive the plaintiff and her associates
ights of Labor of the title to the note in suit. (*Austin*
aring, 16 N. Y. 112; *Watson* v. *Jones*, 13 Wall. 679;
n v. *Hatch*, 109 N. Y. 593; *Grosvenor* v. *U., etc., Co.*,
Mass. 78; *Lloyd* v. *Loaring*, 8 Ves. 773; *Hyde* v. *Woods*,
w. 655; 94 U. S. Rep. 523; *Poultney* v. *Bachman*, 31
49; *McKane* v. *Adams*, 51 id. 629; *White* v. *Brownell*,
dy, 329; *People* v. *Young*, 65 Barb. 357; *Snow* v.
eler, 113 Mass. 179; *Thompson* v. *Adams*, 12 Phila. 484;
ghousen v. *Worth Club*, 4 Abb. [N. C.] 301; *Robinson*
tes City Lodge, 86 Ill. 598; *Osceola Tribe* v. *Schmidt*,
Id. 98; *Karcher* v. *Supreme Lodge*, 127 Mass. 368;
y's Appeal, 116 Penn. St. 391; *State* v. *Williams*, 75

tatement of case.

v. *Lincoln*, 129
31; *Hall* v. *Supre*
Jones, 13 Wall.
mony objected to
ut testimony im
Vt. 73; Abb. Tr.
.)

respondent. The
as treasurer of
seven or more per
sh the existence
Ebbinghousen v.
r. *Goodfellow*, 39
derworker, 74 N.
property of the
licy and courts wi
euring, 16 N. Y. 1
S. R. 209.) The
tiff ought to have
me superior body
ond v. *Deems*, 81
n, 49.) This con
(2 Pars. on Cont.
, 115 N. Y. 640;
Keohler, 77 id. 91;
Smart, 97 id. 55
8 N. Y. 425; *Ba*
llett, 21 id. 412;
ts in their answer
plead the Statute
are deemed to h
Duffy v. *O'Dono*
How. Pr. 512;
555; *Porter* v.

FINCH, J. So far as the defense in this case rests
Statute of Frauds it must fail for two reasons.
defense has been pleaded, and it is not raised by the
of the complaint, and without one or the other of th
tions, the defense, if existing, cannot be made
(*Porter* v. *Wormser*, 94 N. Y. 450.) And then th
further difficulty that the referee has found as a fact
consideration of the note was advanced to the defen
refused to find that the loan was made to the local
board. The evidence was contradictory, but clearly
to justify the finding; and so we must hold the de
promise to have been original, since there was no pri
established to which it could have been collateral.

The effect of the revocation of the charter by the
authorities of the "Knights of Labor" was not to d
property rights of the association as between itsel
debtors, because these sprang from the law of the
not from the rules and regulations of the order. T
are, therefore, not here in question. It is not cla
they operated in any manner to vest the property
assembly in any superior officer or body upon the r
of a charter. That claim was made in the an
repeated upon the trial, but is disavowed here. As
the case of *Austin* v. *Searing* (16 N. Y. 112), whi
the power of confiscation in organizations like the pr
learned counsel for the defendants explicitly adm
brief that "the general executive board did not
divest the title to the property of No. 4120," and sp
its order issued by the general secretary adds: "This
not claim to give a title to property to any one."
effect asserted is that the general secretary was
become, not the owner, but the custodian of the
"subject, of course, to the legal rights of the parties.
is no question of custody in the case. The note
possession of the association, and there is no party
court entitled to dispute that custody, and it is conc
nothing has occurred to transfer elsewhere the own

The whole defense of failure of title
nd different ownership, therefore, diss
estion left is the further contention t
ıe charter destroyed the association
ntiff to represent it in this action.
ımbly 4120 was composed of women.
oked for "insubordination," of whic
'e guilty. The offense and its puni
vers and privileges so far, and so far
ved from the rules and regulations
or, but could not destroy their rights
unincorporated association derived fr
. Under that law they could, as th
ommon purpose and choose officers in
d sue. These powers they had whe
Knights was given, and retained when
ıat event broke off their relations w
ith their own treasury. That treasur
ı their collective capacity until some
way, or it disappeared in a final distr
ers. The defendants have nothing to
They owe their debt to the associa
owed the money and which through it
over it.
e that by their "insubordination" and
from the society and protection
nembers of the association have no lon
e which brought them together. Th
ason for dissolving the association, bu
exist to collect its debts and pay its cr
bution of its surplus. Even where th
ration for violation of its charter it d
s from the payment of their honest
ne with the money when restored, is son
n, but it must first be collected. It d
tors in any event and no rule of the "K
te allows them to confiscate it.

fendants do not assert any conflicting clai
If they did they would still be obliged to pe
r, and could not escape liability. That tri
sociation which the "Knights" have not

There has been a divorce, but that is quite
ath.

I see no good reason why the plaintiff sh
nd the judgment should be affirmed with co
cur.

ent affirmed.

G. LANDON et al., as Executors, etc., Respon
MARY N. TOWNSHEND et al., Appellants.

owner of the equity of redemption of mortgaged
bankrupt and his estate has passed into the hands of a
ptcy, to cut off the interest of the latter by a foreclos
, he must be made a party defendant to the foreclosu
entative or official capacity, or it must appear in son
of the proceedings that they relate to or affect the t
e fact that he was made a party individually is not
aterial that he knew the foreclosure related to lands
upt, and that he had no interest therein save as
Hodge (34 Hun, 524), distinguished and limited.
tenant at will cannot transfer any of his rights to an
y ends, if he makes such a transfer and surrenders
e person taking it coming in as a trespasser only,
on claims the right of occupancy simply by virtue of
recognition and allowance of such claim by the ow
makes the occupant a tenant at will the same as his pr
cupation continues the possession of the owner.
g of a fence around land does not alone, as matte
y constitute a taking of possession, and where the
ccupied and cultivated by a tenant of one claiming
pancy continues without being interfered with in a
ut any recognition by the tenant of any right in the
as owner or occupant, and when it appears the fence
he knowledge of such claimant, a finding is justified
was a mere entry, not a termination of his possession
of ejectment brought by the executors of H. to re
in the city of New York, these facts appeared: In
the owner of the premises which were subject to a

Statement of case.

declared a bankrupt, and his property passed into the hands ee in bankruptcy. P., the mortgagee, thereafter commenced foreclose the mortgage, to which the assignee, as such, was party. In 1846 a decree of foreclosure and sale was rendered, were sold, and purchased by P., to whom the master in ecuted a deed purporting to convey the fee. P. entered into ed in possession until his death in 1855. P. died intestate, t to a judgment in an action of partition between his heirs were sold, and in 1859 conveyed to H., all of the heirs of the conveyance. Prior to this another action had been com- he administrator of P. against the said assignee to foreclose ge, in the complaint in which the facts as to the prior fore- sale and the possession by P. under it were recited. Judg- reclosure and sale was rendered and the premises were veyed to H. At the time of these conveyances to H. the re in the occupation of S., he having entered as tenant thereafter continued in the occupancy as tenant at will 1865, when he transferred his occupancy to B., who went after occupied the premises in the same manner as S. had cultivating them as a vegetable garden, he claiming no or interest than as tenant at will of H., which tenancy was nd acquiesced in by the latter. B. died in 1872 or 1873, ontinued in the occupation of the premises, cultivating it in nner, until the death of H. in 1884; in that year defendant ion. *Held*, the evidence justified a finding that H. entered tinued in possession from the time of the delivery of the in 1859, until his death, he claiming to be the owner and same adversely; and that, therefore, he acquired title by ession.

lant received a deed of the premises from one claiming to ity of redemption; in 1875 she built a fence around them, r that purpose being peaceful. It did not appear, however, d any knowledge of this act of defendants; that it inter- y way with the occupancy; that there was any change possession, or that the tenants then or thereafter recognized owner. *Held*, that the erection of the fence was not neces- , valid taking possession, and so a termination of the adverse f H., and the evidence justified a finding that it was a mere osition to the occupants, and so, not an interruption of the ession

ober 23, 1891; decided December 1, 1891.)

om judgment of the General Term of the Supreme first judicial department, entered upon an order

made April 6, 1891, which affirmed a judgment i of plaintiffs entered upon the report of a referee.

This is an action of ejectment brought to reco possession of certain premises in the city of New Y described in the complaint.

The plaintiffs are the surviving executors of one B H. Hutton, who died in the city of New York on day of February, 1884. John N. Whiting, who is n the will as one of the executors thereof, died on or al 19th of April, 1885, leaving the plaintiffs sole survivin tors. On the 5th day of September, 1835, Edward P his wife conveyed to one John Scudder in fee the involved in this action. Scudder at the time gave Price a purchase-money mortgage to secure the pay $1,000. On the 23d of March, 1836, Scudder c these premises to one Ebenezer L. Williams in fee, st the mortgage. On the 4th of February, 1843, Willi being the owner of the premises subject to the mortg duly declared a bankrupt by a judgment of the Court of the United States in the southern district York. William C. H. Waddell was at this time th assignee in bankruptcy in that district and he bec assignee of Williams. On the 21st day of Novembe Price commenced a suit in the Court of Chancery to f the mortgage made by Scudder to him. Neither W nor Waddell was made a party to this suit. On the April, 1846, a decree was therein made for the sal premises, which provided that the master should execu purchaser a deed thereof, and dispose of the proceed sale as directed. The premises were, on the 8th day c 1846, sold under the decree by Philo T. Ruggles, th in said court, and Edward Price, the mortgagee, bec purchaser at the master's sale. On September 8, 1 master executed, pursuant to the decree, a deed and d the same to Price, purporting to convey the fee in th mentioned premises. Price entered into possession premises, and as is found by the referee continued in

death, which occu
ed intestate and l
he 23d of Februa
tion in the Supren
the other children
things, the partiti
s such heirs. Su
judgment of part
n the 17th of Ju
, a part of the p
struck off to B
s sold to one Cush
On the 22d o
said judgment c
utton. On the 2
f Edward Price, v
ted in the executi
nple of the same
day of Decembe
tor of the estate
n action in the
widow of Eben
ll, who were the o
reclosing the mor
Price. At this t
t in this action an
it had theretofor
rtgage, but that
de a party to it,
and the premises s
e master and e
er the deed, and
f his death, and
nained in possessi
and sale in that
1858, and on th
e sold to one G

Statement of case.

Hutton, to whom the refe
28, 1859.

execution of these three de
emises mentioned in them
Frank Surgent as tenant, ar
premises either as sole ten
ard Price during his life,
is heirs until the conveyanc
ove described. The finding
f the tenancy and occupatic
the death of Price was exc
as wholly without evidence
ound that "under the three
n entered into the possessi
ued in possession thereof u
aid period, from the deliver
ntil his death, said Benjan
wner of said premises and
r interests." To this findi
cepted as founded upon no
ound that Edward Price e
mises under the master's de
46, and continued in posse
f June, 1855, and during
ed to be the owner of said
rsely to all other interests.
pon Edward Price's death
of these premises and conti
were conveyed to Benjan
o him from the referee in
d Price and from the refe
of *Coulter Administrator*
that period the heirs of
wners of the premises and
r interests. Counsel for d
lings of fact as without evide
found that the plaintiff's h

Bliss v. *Johnson*, 94 id. 242.) If Hutton's posse tinued until 1875, it was then interrupted by defe hend taking possession and enclosing the premis stantial fence. (*Poignard* v. *Smith*, 6 Pick. 1 v. *Vandenbrande*, 17 Wkly. Rep. 53.) In order possession should ripen into a title it was nec should be continuous and uninterrupted for (Code Pro. § 81; *Cleveland* v. *Crawford*, *Jackson* v. *Phillips*, 9 Cow. 113; *Malvy* 86 N. C. 259; *Doe* v. *Campbell*, 10 Johns. 47 Townshend showed a perfect title to the premis *burg* v. *Herdtfelder*, 103 N. Y. 306; *Wiswal* 14 How. [U. S.] 66; *Wayman* v. *Southard*, 1 *Lemaster* v. *Keeler*, 123 U. S. 389; *R. G.* *Gomila*, 132 U. S. 478.) Supposing Hutton to the fee in the premises, the plaintiffs as executors tain this action. (*Cluff* v. *Day*, 124 N. Y. 195 *Rielly*, 95 id. 64; *T. T. Co.* v. *C. R. R. Co.* The referee erred in granting defendants' motion complaint. (*Merrill* v. *Seaman*, 6 N. Y. 1 *Washburn*, 79 id. 214; *Van Cott* v. *Prentice*, *Rathbone* v. *Honey*, 25 id. 465; *Lockman* v. *Rie* Hutton's will gave his estate to his widow, chil tees until the residue of his estate was ascertain appears the residue has not yet been ascertained. when ascertained, was given to the executors i there is not any devise to the executors of the r estate was in testator's heirs until the residue w (*Landon* v. *Bauer*, 38 Hun, 614; *Hobson* v. *Hale*, *Cooke* v. *Platt*, 98 N. Y. 35; *Chamberlain* v. id. 192; *Embury* v. *Sheldon*, 68 id. 236; *Roe* v id. 204; *Burke* v. *Valentine*, 52 Barb. 425; *Sm* Edw. Ch. 523; 1 R. S. 727, §§ 1544, 1545, *Hawley* v. *James*, 16 Wend. 171.)

Joseph H. Choate for respondents. A perfe accompanied with possession, has been shown

ownsend, 25 N. Y. 481
v. *Clark*, 16 How.
428, 448; *Bowen* v.
es [3d ed.] § 1473; Tl
Wait's Pr. 197; 1 Abl
nd v. *Stokes*, 61 How.
30; *Beers* v. *Shannon*,
32 id. 639; Bliss on Co
n Pleadings [16th Am
, 172; *Wagner* v. *Ho*
land, 81 id. 405; *Nort*
me v. *McCarter*, 94 U
. Y 98; *Carr* v. *Carr*
nl. on Ev. [14th ed.] 4
ents v. *Machebœuf*, 92
t C. 22; *Roscommon*
it on Titles, § 789.)
tle by adverse possessio
r. *Edmunds*, 94 N.
3; *Bedlow* v. *N. Y.*
v. *Schoonmaker*, 11
632; *Hodyen* v. *Shan*
nd, 76 Penn. St. 172;
s on Mort. 1395; *Jac*
low v. *Clark*, 47 N. Y
S. 268; *Robinson* v.
n, 50 id. 345; *Shriv*
Tedbury, 53 id. 98; *Hu*
Dewey, 46 How. Pr.
testator were only mor
o defend that possessio
no, under worthless d
gfully obtained posses
nant or agent of the
etc., *R. R. Co.*, 3 Lan
359; *Hunter* v. *Starin*
Y. 343, 344; *Simmons*

S. R. 613; *Phyfe* v. *Riley*, 15 Wend. 253; *Marsh*, 54 N. Y. 599.) The defendants' alleg worthless, and even if plaintiffs have failed to pr record title, or a title by adverse possession, or recover as mortgagees in possession, still the plainti tled to recover as against these defendants, because established a prior possession. (*Page* v. *Waring* 469, 473; *Palmer* v. *Morrison*, 104 id. 132–136 730; *Peck* v. *Brown*, 2 Robt. 119–133; *Young* v 101 U. S. 782; *Stevens* v. *Hauser*, 1 Robt. 50; 39 *Kip* v. *Hirsh*, 103 id. 565; *Moller* v. *Tuska*, 8 *Pickett* v. *Leonard*, 34 id. 175; *Stuart* v. *Foste* Pr. 305; *McLaren* v. *McMartin*, 36 N. Y. 91; *Lambert*, 98 id. 309; *Baker* v. *Bliss*, 39 id. 74; P § 130; *Price* v. *Brown*, 101 N. Y. 669; *Hunter* 26 Hun, 529; *Carleton* v. *Darcy*, 90 N. Y. 573; *Scott*, 14 How. [U. S.] 282; *Whitney* v. *Wright*, 171; Sedg. & W. on Tit. 718; Whart. on Ev. [2d *Murphy* v. *Loomis*, 26 Hun, 659; *Mayor* v. *Ca* N. Y. 284; *Thompson* v. *Burhans*, 79 id. 93.) T to dismiss the complaint was properly denied. (*Bauer*, 23 Wkly. Dig. 95.)

PECKHAM, J. This case has already been before and is reported in the 112 N. Y. 93. The defend sel claims that the case is now *res adjudicata*, as fact existing in the case now before us which did n that time, and that this court then decided upon t the plaintiffs were not entitled to judgment.

The counsel is mistaken in his claim. The decided by this court on the former appeal was as t of the attempted foreclosure by the administrator against Waddell, the assignee in bankruptcy, wherei was made a party, but not in his official capacity. W in order to cut off his interest as assignee, it was ind that the suit should have been brought against h representative or official character, or that it shoul

ace of the proceedings that
nkrupt's estate. We held th
gs in that foreclosure suit did
s the plaintiffs claimed to hav
are suit, the judgment found
ed.

he plaintiffs asks us upon t
ew and reverse our former de
he insists that the case as no
respects from that which wa
n those differences it should t
ldell, the assignee in bankrup
re suit in question. We fail
has been made in the facts rel
they appeared upon the for
, as it appears now, that upo
his title passed to Waddell, an
n his official and representati
ndividual or beneficial interest
new that the foreclosure in que
s assignor, Williams, did not
but that fact we held to be
r. It does not now, any more
ar on the face of the proceedin
l the bankrupt's estate.

wever, is now called to the cas
n 34 Hun, 524, and affirmed i
, in 98 N. Y. 654. It is cla
ondents that the principle dec
ere, and that inasmuch as the
other interest than as such
eclosure suit effectually cut tha
n the case in Hun regards th
of real estate. The learned
rks said that probably the ri
f by the judgment in foreclo
of such judgment was not dire

nance of the case in this court, without, s
did not affirm more than was actually deci
reason to reverse our former ruling and
it to a consideration of the other facts in
imed by the learned counsel for the defe
nstances under which Edward Price e
of the premises in question, under the m
foreclosure proceedings of *Price* v. *Sc*
possession that of a mortgagee in pos
did not inaugurate a possession adverse i
rtgagor or those claiming through him.
ossession of Price being that of a mortg
e mortgagor or his assignee had the ri
in ten years of the entry of the mortgag
to redeem the property by paying the a
rtgage, and that before the ten years ela
agee in possession, died. It is then urge
ence that the heirs at law of Price took
he evidence is uncontradicted that his ad
id take such possession, and that while i
nced an action to foreclose this very mo
aint in that action was an admission tha
ed and was a lien upon the premises cov
the period of possession by the administr
to that of the mortgagee in possession, Pr
ut the necessary ten years for the limit
the part of the mortgagor or his assignee to
from the lien of the mortgage by paying
on. In this way the defendant claims to
the time of the giving of the deed to
n the sale under the second foreclosure,
had in fact been maintained, and that it
when that deed was delivered, in Janua
other deeds from the heirs of Price to
referee in the partition proceedings to H
which delivery was in April, 1859, that it
dverse possession on the part of Hutton

was such tenant of
cy of the premises at
off, who paid him at
y of the land in the
hich was as a vegeta
gent was only a ten
.e learned counsel fo
cter of the holding
unds it upon the pr
fer any of his righ
.s tenancy is of such
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the person who com
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argent had. In othe
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occupation of the pr
n held that the owne
nize the occupation
ned to come in unde
nothing but a tenant
assignee of the righ
ssignment, and in n
ecognition of such e
d constitute such per
essor. We think the
hat the assignment
e premises and the e
quiescence in such e
e tenant of Hutto
session of Hutton

facts, the referee or jury
en a tenant and her rig
hts of Hutton. And w
rd to the continuation of
'he evidence is that the o
re as during Bischoff's
ated in the same manne
time when Greb and his
the fact that Edward P
mises from 1846 until
to be in possession from
y the referee in the part
upon that sale Hutton
possession, claiming title
until 1865, when these va
already stated, we canno
no evidence to sustain th
choff, after her husband
on in occupation of the
4.
ther fact which the defe
ng the continuous chara
part of Hutton. The re
ry, 1873, Mary N. Tow
l from George Law and
mises in question, and sl
ner of the equity of red
Waddell, as assignee in b
o finds that in 1875, defe
nce around the premise
on for the purpose of bu.
no proof that Hutton ha
he building of the fen
constitute a termination
he commencement of l
lot may, under some ci
session of such lot, but

v. Townshend

Court, per Peckh

action of the f
e fence under
valid termina
ıtton then in
Vandenbrande
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was broken by
d the premise
ers of an hou
ve affixed tha
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above claima
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land had be
was unoccupi
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he absence of
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se possession.
party who ha
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. Y. 235) the
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he true owner
n must be co

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that it termin

Statement of ca

ode of Procedure (§ 167)
incidental to a recovery
claim for rents and prof
a separate and distinct
ed, under and by the Cod
requirement is dispen
ff is entitled to recove
s and profits or value of
ommencement of the act
n such an action the land
enying simply the allega
ediate possession and tha
by defendant, *held*, that
the trial to the questi
ermined upon sufficient
proper awarding him p
for damages plaintiff
he annual rental of the
of the action to the time
a recovery of these it
general demand, for a te
ould not be proper.

26, 1891; decided Decen

s from judgment of
in the first judicial
March 13, 1891, whi
udgment in favor of
rmed an order deny

of the action and th
e opinion.

lephens for plaintiff.
e defendant, even t
cy of the property.
1503; *Finnegan* v.
, §§ 3, 36; *F. L. &*
Empire, 5 Hill, 48.)
premises. (*Daly*
n, 70 id. 34; *Quimb*

2 How. Pr. 353.) The plain
me of the commencement
imed any interest whatever
Degraaf, 81 N. Y. 268; *Br*
; Code Civ. Pro. § 541; Tyl
l to prove a legal title to the
les, § 792; *Miller* v. *Downi*
R. R. Co., 71 id. 383; *Gar*
ham v. *Townshend*, 118 id. 5
should have been granted. (
; *Hennessy* v. *Paterson*, 8
id. 581.) The court in the
vidence as to the annual rent
erly reversed. (*Larned* v. *L*
577, § 39; Code Civ. Pro.
ractice, 12; *Cagger* v. *Lansi*

This action was for the recov
real property in New York c
y the plaintiff upon a verdi
nd also a sum of money as t
from the commencement of
The General Term affirmed
ave to the plaintiff the posses
sed that portion of it which
olding of the possession.
s court.

fendant's appeal, the objectio
t the complaint should hav
'endant was not the actual oc
ave claimed any interest in t
mmencement of the action, a
in the plaintiff or her ancest
satisfied with the disposition
Term of this objection, and
l point is called for. As an
he contest is necessarily over

de as to plaintiff's title s
defendant, was wrongfu
was no error in holdin
s then presented. The
7 N. Y. 493) is quite in
question of defendant's
here was sufficient evide
ue submission of the qu
y their verdict. As to t
ecessary to add to the

plaintiff's appeal the qu
) recover damages for
easured by the annual re
the commencement of t
his question the Gener
the plaintiff, holding, on
57 N. Y. 151), that such
et out in the complaint
eir recovery that damag
judgment. Hence they
such damages and for th
be recovered, and, *pro*
dgment.
ling I think the Gener
effect of the changed pr
ure. *Larned* v. *Hudson*
the withholding of the
n for rents and profits
t case was expressly bas
ting Code, the 167th sec
in the same complaint several causes of actions
ch a case out of "claims to recover real property,
hout damages for withholding thereof, and the
ofits of the same." That language, it was held,
ne fact that a claim for damages for withholding
emandable and recoverable in an action for the

ds upon the construction to l
e executors were directed t
ing an inventory to collect
ch as they deemed proper
ıt of such debts and the
pay all the debts of the d
debts, the executors we
e into four equal parts.
or gave absolutely to his
other three equal parts w
g language: "I do give an
equal parts of the said divisi
ate, as above mentioned, unt
who shall consent to act,
r refusal, incompetency or
person or persons as they sh
sal to make such choice, the
chancellor shall appoint, to l
ıal parts of the said division
ughters Helena D. Townsen
ownsend, severally setting ap
qual parts of the aforesaid
ames, and thus continue to h
er use to whom it shall hav
ive at the age of twenty-one
onstantly keep insured the e
ıe of such one of my said da
them, and pay all assessme
or such other of my real p
as above directed, and shall
es in safe securities all money
urities apportioned to them
pense thereof to the share of t
een apportioned as above, and
dental expenses, shall apply
l several portions to the resp
ation of said daughter to w

ioned to her as hereinbefore directe
therein, and the absolute property
r own several right, exclusively to po
deed, will, or otherwise, and to appr
ils thereof, provided always that my
tor acting, as aforesaid, in the execut
satisfied of the existence of such tra
aid husband, and shall have first giv
a written testimonial to that effect, a
thority to do at any time as well afte
ly executed the *other* provisions of tl
d codicil, bearing date in the year 1
ch in any way affects the title to the
so far as material is in the following
said daughters, Helena, Maria and
e attained the age of twenty-one yea
n shall then have and hold all and s
nal property), severally apportioned to
ccording to the several clauses and d
will, for and during her natural life,
and free from all control, etc., of a
ay have, with remainder in fee to l
their descendants, and that she and the
free and uninterrupted enjoyment of t
out molestation.

will that each of them, if married, do
espective portions aforesaid as if they
arried."

pal question in the case arises upon
nt claims that its effect was to rev
the will above quoted, whereby powe
ors, upon being satisfied that the husb
ssessed the qualities specified, to con
fee.

r 1850, an action to partition the real
tator died seized, including the lands
ed. The children and heirs at law of t

n case of the execution and de

r conferred upon the executors i
voked by the codicil, this instrun
the daughters as it had for that p
veyance. (4 R. S. [8th ed.] 2475
that the codicil contains no exp
the testator intended to revoke s
f the will as that which vested
ıe daughters, upon the existence
certified by his executors, it is
he would have used appropri
h a result, and not leave it to c
We have had occasion recently to
icil upon the original will. In t
med that the codicil revoked an i
will. The language of the codi
e favorable to revocation than in
ad no such effect. (*Redfield* v.

irreconcilable conflict and no
nguage of the codicil and the pr
claimed is thereby revoked. I
violence to the language used b
what the testator intended to acco
revocation of the provision of th
nay be answered that he intende
ı were, no doubt, deemed to be i
by the terms of the original will
ıe daughters' shares was in the ex
d that upon the daughters attain
rs they should be vested, with th
cording to the several clauses an
ill" for and during her natural li
se from the control of her husba
e both executed prior to the legislation in this
to the rights of married women to take and

in case of the death of his associ
sbands of the qualities specified
determined by the executors alo
f the duty imposed upon them
, and upon this question the tes
plies to the lands in question th
ny years before its execution, b
r does the judgment in partitio
s vested with a life estate in the
question. That judgment wa
ion existing in 1850 when it w
ecutor exercised the power to
fee. It is not in any respect ir
of a fee simple absolute in M
eath. We think that the conv
nt by the plaintiff, was a good
nd was sufficient to vest a per

nt of the General Term should
red for the plaintiff that the de
he contract.

eversed and ordered accordingly

DWALL, Respondent, *v.* CORNEL
Appellant.

tors," as used in the provision of the
0, chap. 40, Laws of 1848), making t
rganized under it liable to the creditc
amount of the capital stock has beer
filed, does not include directors of th
hom the corporation has become indel
imposed.
to one named as a trustee in the certif
pany and who acts as such, although
egally act as trustee although not a st

aud. (4 Hun, 802; 66 N. Y. 558; *Bed*
419; *Jones* v. *Jones*, 6 N. Y. S. R. 736.)
act proven between the plaintiff and t
than that set out in the judgment-roll a
And no ratification by the compan
(16 Hun, 65; 38 Barb. 616; 118 N. Y
4 Hun, 483; 16 id. 65; 84 N. Y. 190;

arles S. Lester for respondent. The fin
dant Cornelius Sheehan was a stockhol
ion to the amount of one thousand dollar
l by the evidence. (*McNeil* v. *T. N. I*
Cutting v. *Dameral*, 88 id. 414; *Jackso*
. 203.) The finding that "the Saratoga U
e plaintiff in the sum of $2,153.10, wi
sustained by the evidence. (*Bailey* v.
483; *Gould* v. *Board of Education*, 3
v. *Lefferts*, 16 Abb. Pr. [N. S.] 42, 56;
R. R. Co., 2 T. & C. 653; 58 N. Y. 623
laimed on the trial that plaintiff could no
n because one stockholder could not sue s
uable. (*W. & B. I. Works* v. *Chittenden*
orn v. *Lefferts*, 58 N. Y. 179.)

rl, J. In May, 1887, a corporation calle
n was organized under the General Man
48 and the acts amending the same, for
shing a newspaper in Saratoga Springs.
corporation was signed and acknowledge
udson, Edmund J. Huling, John W. How
he plaintiff, who thus became the incorpo
named in the certificate as the trustees fo
ne tenth day of June thereafter, at the fi
ncorporators, Huling was chosen president
the plaintiff vice-president and Judson
al manager, neither of such persons at t
holders or subscribers for stock. Prior t

no certificate was n
1 of the act of 1848.
the corporation to 1
thereof, and he re
ereon which was retu
ed this action to enf
kholder under sectic
ie stockholders of suc
ally liable to the e
ie amount of stock he
ntracts made by the
apital stock fixed an
en paid in and a c
and recorded as pres

relation to the con
before the corporati
tock therein, and h
y, 1887, before the
vent to Judge Putna
r for the sum of $1,
gift to help the en
amount to the co
not incur any further
with the check witl
expressed in his dir
o aid the enterprise
n of $500 on the
1 day of July, 1887
t to Putnam and stat
e shares of the capit
, whereas there had
r. Putnam believe
ated it to the defen
y he made his check.
der of the plaintiff
led the check left wi

ility of the corporators and other
by law." Can it be supposed th
ition in drafting this section had it
s of corporations, and that the
solicitude whose protection shoul
nental law? In 1846 private co
ds were rapidly increasing in this
iat day thought it wise and sound
ors of such corporations should in
have, besides the corporate respo
individual liability of the corpora
plainly had reference to outside cr
g with and trusting it, and genera
ocial condition. It could have no
corporation who manage its affair
s condition, who create the debts
emselves, if creditors, before diss
onstitutional provision and the l
he policy embodied therein wer
ion of the debt makers, directors
editors of the corporation, and th
urden upon stockholders whose
heir hands. We think, by the fa
ge used in section 10, the det
its scope, as well as from the
o promote. Suppose the whole
n had been paid in, but the certi
l recorded, the plaintiff would sti
would it be contended that he
protection intended by the sectio
of the corporation? If not, why
mply because the word "creditors
ude a creditor thus situated. E
e fairly said to be within the ge
urly without the policy of the law,
intention of the law makers, that
cover his case, and for this view

Statement of case.

ALBERT O. BRIGGS, Appellant, *v.* HARVEY AUSTIN, Re

In the absence of an agreement between the parties to a lease
tural lands, vesting the title to the hay produced thereon in
as security for rent, or for any other purpose, the law ves
lessee.

An agreement by the lessee in such a lease, to maintain upon t
demised, certain cows belonging to the lessor, is an independ
tion and does not affect the right of the lessee to sell the h
even if he be insolvent.

A general creditor having no judgment, cannot maintain an a
aside a conveyance by his debtor in fraud of the rights of c

(Argued October 28, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the
Court in the fourth judicial department, entered upo
made February 3, 1891, which affirmed a judgment i
defendant entered upon a decision of the court o
Special Term.

This action was brought to set aside as fraudulent
mortgage executed by the defendant Ely D. Aust
defendant Harvey Austin, and to restrain defend
removing hay and grain from the premises.

It appeared that on February 1, 1887, plaintiff
said Ely D. Austin for one year a farm with certain
lease containing among others the following provisio
butter made on the place is to belong to and be the
of the said party of the first part until the rent is pa
party of the second part agrees to keep the cows in
dition to grass in the spring of 1888. The party of t
part is to have all the straw on the place and one-ha
grain now (at the date of making said lease) on t
except three bushels of wheat and two loads of s
party of the first part is to have title to said grain
rent is paid."

The lessee in May following executed to said Harv
a chattel mortgage covering "all the hay, grain
growing or standing on said farm."

e apparent devise of such
ɔther. This apparent devi
nd the allegations in her
provisions of sections 1533
ocedure.
ɜtor, at the time of his de
nan, also the plaintiff, who
aura A. Mabie, his sister, tl
rs at law. He left a will w
by which he gave to his wi
g her natural life. The seco
ı:

At the death of my wif
my real estate situate in tl
. lies southerly of the new
nan's Station, past the dwe
ıe Baptist Church and Socie
ɔy said Church and Society
ver said Society ceases to u
ıe shall revert to my heirs
as a parsonage includes my
acres of land, more or less.'
w took possession of the rea
ased, and was still in posse
ıent of this action.
ch organization known as t
Dykeman's Station was orgı
l was a member of the soci
and it continued to exist a
1889, when it became incorp
eman's Baptist Church and
zation as is mentioned in t
the deceased.

ł *S. Barnum* for appellant.
st Church and Society at Dy
on that no such society as

ritt v. *Everitt*, 29 id. 67; *L*
ner v. *Durant*, 76 N. Y. 1
; *Vincent* v. *Newhouse*, 8
121 id. 532.) The incor
o the death of the testator's
will. (*Holmes* v. *Mead*, 52
n, 43 id. 254; *Shipman* v
Society v. *Hepburn*, 32 N.

M, J. The plaintiff maint
st Church, as set forth in t
ykeman, deceased, is void, b
age used in the will, intende
l church immediately upon h
state mentioned by him and
the life estate of his wife,
time of the death of the tes
on and unable to take prope
void and the property desce
tator.
estion is primarily one as to
he, by the language he used
tion of his estate described
nt of his death, or did he ir
t take place until the dea
hat it should at once vest in
oid, for at that time the soci
unable to take under the wil
, of course, be discovered fr
d by him in the will itself.
ed that if at the death of th
sted in the heirs at law, it becomes of no importance
hereafter or prior to the death of the widow the
ould become incorporated and thereby rendered
taking property by devise. The property having
d in the heirs, could not, it is claimed, be thereafter
nd go to the incorporated church upon the death of

Court, per PECKH.

happening of a
Leonard v. *Br*
not made use o
the implicatio
on of the testat
he devisee at h
e at that time s
and the judgme
o the remainde
he testator to t
ject to be dives
corporation.
vest?
e learned judg
n this case, the
ee could not ali
e of the tenant
t should be use
he society cease
t to the testato
never intended
om the devise u
l the right of
nd there could
nt of enjoymen
e testator only
right to use thi
only as a parso
the land should
nt the estate sh
t that time the
.
not contemplate
He intended,
to that end he
l and would be
e, and if anyth

Statement of case.

ıded the devisee to take no interest ir
ı the condition and for the purpo
essed by him, and that intention wou
ame weight as if the condition were l
e are of the opinion that the dev
e in the devisee until the death of the
if at that time the devisee shall be in e
king, it will take the estate under the
ıe devise is, therefore, not void and t
ial and General Terms should be affi
.l concur.
ıdgments affirmed.

ı D. DEMAREST, Appellant, *v.* WILLIA
etc., Respondent.

ered into a contract with K. whereby the
title to a certain piece of land, subject to
;e, procure a builder's loan, and erect two hc
reon; K. to furnish one-half of all money
uired to finish the houses. S. agreed whe
onvey one of them to K., by warranty dee
-half of said mortgages, or, in case the parti
n a sale of both, to pay K. one-half of the
:t stated it to be the intent of the parties to e
ch might be realized by the sale of said build
ortgage on the premises to secure performan
t. No sale of the property was made. In an
S. to recover for work on the buildings, in
d K. responsible as a partner, *held*, that no p
contract, as all it contains in relation to a sa
onditional upon the further agreement of th
on might be considered as a purchase by
cutory contract of sale.
ns, if the agreement had been one to build tl
profits, this would not, of itself, establish a

gued October 29, 1891, decided December 1,

PPEAL from judgment of the General T
t of the city of New York, entered

Opinion of the Court, per RUGE

h. J. The question preser
liam Koch was a partner with
ant, in the business of buildi
The referee having found,
not such partner, and the G
nterfere with this finding,
ss some error of law, commit
e case.
ed by the appellant that the
s. Spaulding and Koch, n
between the parties, and sh
becomes necessary to consi
. As by the terms of a co
Mrs. Spaulding became boun
contract in relation to the s
and Koch, and made that c
nienient hereafter to avoid ref
the contracts between Koch
ntained in one instrument
By these contracts, Mrs. S
le to a certain piece of land s
lred feet and five inches deep
, subject to a purchase-money
l dollars; and also to procur
d dollars on such property a
e finished by a specified da
alf of all the money, in excess
h was necessary to construct
f such moneys were to be devo
uction of such buildings.
king, Mrs. Spaulding agre
the time specified and aft
Koch that one of such house
arranty deed, subject to the
nortgages; or, in case the pa
and buildings, that she woul
ice received on such sale. "

ense the transaction may
able Mrs. Spaulding to
out in a strict sense it is
r an executory contract
act none of the elemer
had no idea of forming
e express terms of the co
l complete the houses at
them to Koch by warra
of property or profits
pt such as would follow
se a house for a specifi
o be built.
his should be considered
livide the profits, we thi
ership within the case of
circumstance that in t
y the money loaned, doe
ciple which is to govern t
e money was to look to t
ent of his advances, anc
n the property, but also
s. In that case the lend
fits of the business, but
aranty of the borrowe
ain sum.
es in the cases do not,
inciple, and both cases sl

should be affirmed.

rmed.

17 id. 161; *Kent* v. *Snyder*, 9 V
, 2 Barb. 300; *McCarthy* v. *Le*
Reynolds, 2 Robt. 655; *Nichols*
v. *Palmer*, 1 N. Y. 564; *Leroy*
5; Wood's Mayne on Dam. [An
wed that defendant had not ar
ade the deed to plaintiff. (*Horr*
dell v *Montross*, 68 id. 499; *B*
. 88.) The maxim "Once a m
' is applicable to this case. T
ortgagor (Bockhorn) in the pren
ished only by foreclosure. (*La*
N. Y. 200.) The good faith of
dant while it might enable him
a good defense in this action.
l of a title he bargained for and
nts in defendant's deed to him.
J. Eq. 313; *Fleming* v. *Burnh*
Williams, 115 id. 586; *Vought* v
ng v. *Campbell*, 121 id. 553.) It
requests to be allowed to go to t
N. Y. 678.) The plaintiff's cla
by the proof. (Wood's Mayn
Chase, 22 Me. 505; *Brandt* v.
Allen, 22 Barb. 388; *Rector* v.

ngton for respondent. A *bona*
held by an absolute deed, even t
s security for a debt, obtains a go
nade without notice of such
v. *Lynch*, 6 Bosw. 138; *Stodda*
s v. *Comstock*, 5 Johns. Ch. 21
N. Y. 280; Sedg. & Wait on Tit
Bank, 46 N. Y. 325.) To consti
f warranty, there must be someth
. (*Ingersoll* v. *Hall*, 30 Barb. 3

ning, it may be observed that
rber & Co., already having a
uld take another mortgage or
debt, without any apparent r
ord it as a deed. But the pr
at this deed was not intended
n, a witness for the plaintiff, t
deed was given to secure the
testified that the debt did n
vas not thereafter indebted to
ere to sell the land, and, after
g the debt to them, they were
ice to him; and H. K. Thurt
n the same subject, testified s
Thus it is clear that the debt
uid by an absolute unconditi
the defendant, and by vestin
the benefit of Thurber & Co. a
urther title to or interest in th
being in the proceeds to be r
defendant. There was then
e did with the land exactly
r the parol arrangement with
ly right was to call him to a
nd they appear to have prove
n the land.

.ere fact that Bockhorn, or so
ting him, claims that the deed
es not render the title conv
, or make the defendant liat
nants in his deed. Any absol
evidence given for the purpos
as a mortgage. But a gran
venants in the deed to him in
that the claim is made that l
, but he must establish that it
ge. This the plaintiff failed

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Statement of case.

ediate neighborhood or trouble him at
hereafter purchased other premises in tl
erecting a large flat thereon, and upon l
he conveyed the premises to the othe
in exchange for other property of comp
as her agent and architect continued t
title, with full knowledge of all the fa
th the intent of aiding and protecting
oid his contract. *Held*, that plaintiff wa
aining the proposed erection, or the use
as a flat.

r 29, 1891; decided December 1, 1891.)

n judgment of the General Tern
klyn, entered upon an order ma
ffirmed a judgment in favor o
decision of the court on trial at
was brought to restrain the defe
.ts on certain premises in the city
far as material, are stated in the

Beecher for appellant. Plaintiff
n. (*Hubbard* v. *Miller*, 27 Mich
106 N. Y. 473; *Piggott* v. *Strat*
There can be no objection to t
ecause it is in restraint of trade
Y. 244.) The fact that this rest
parol does not at all affect plain
Tallmadge v. *E. R. Bank*, 26
ch, 70 id. 440; *Gilbert* v. *Pete*
n v. *Head*, 86 Kan. 156; Taylor o
Rhodius, 87 Ind. 1; *Remington*
Chapin v. *Dobson*, 78 id. 74;
529–536; *Dodge* v. *Zimmer*, 11
Worthington Co., 119 id. 592.) T
he question as to whether the rest
enant running with the land, has
ion. (*Hodge* v. *Sloan*, 107 N. Y
y, 1 Hall, 105; *Whitney* v. *U. I*

he Court, p

vhatever
n addition
e contrac
which is n
Wend. 1
ow. 307;
10 N. Y.
oan, 107
s indefini
t is inten
rformed
s. § 342;
This is
ted, as it
the dama
at law. (
R. Co.
Juris. § 9
342.) It
ally enfor
tees, etc.,
e equitabl
cker, 42
4th ed.] 5
nt. 243, 2

alleged in
ere held t

was on
ues in the
nich runs
vate resid
cial stand
taste, and
od, they
never bee

ars to prevent the erec
g Gollner free to rej
ighborhood, and inflict
ute had been paid.
f's proof, accurately un
e agreement when he
build flats in the vic
kmailer;" and when
ss Moody, Gollner sa
after I had taken l
uld not do it." And y
ut when his contract
payment was made,
of a lot on Union str
and, obtaining title
seven-story flat. Wh
nonstrated with he se
regarded it as a good j
he guessed he could
he had $6,000 of it i
he would see that g
." Then came a lette
in action, and a refus
r supply him under th
sought shelter for his
r an ownership in hi
was $2,000, and that
ture upon the found
ty in two other lots
rs; and then, as her
orm, continued the c
to this artifice and
all the facts, and unqu
intent of aiding and
oid his own honest ob
of facts had its natur
e General Term, after

ve are in fact dealing wi
ıtion of the defendant G
nd tenement-houses. H
ıt as his specific busine
' it on in plaintiff's neig
.ollars not to carry it on i
o would in fact cause inj
: money. Of course, th
ıt case and those in whic
competition ; a difference
ter of the injury resultin
e does not disturb the d
per case, equity will spec
r restraining injunction s
lid contract, although a
fact that it happened to
s upon the ground that s
o complete justice, or ac
by the contract. Even
penalty for its breach, it
ust be denied, for, if th
aracter and purpose tha
y the parties and not m
itable relief will be awa
er, 106 N. Y. 474.) W
strain the commission of
ıe plaintiff is somewhat
which equity acts to p
ress it. There is, theref
ner was still the owner
ıcting the flats his ent
ction. No other remed
portions of the contract
ɔe an accurate substitute
ress the injury. It woul
actual effects could sca
tiff could only escape by

ts. In other words, w
uitable rights at once
so long as Gollner ov
ceases to be merely a
l was intended to affe
fter-acquired land in
remains technically s
nd settled doctrine is t
the use of the land wl
e land itself into the
lge of all the facts, wl
ng equity, and more e
purpose of defeating a
ld that the equity resul
e latter was not a cove
xception or reservation
ound of a personal co
nevertheless, go with
vith notice, and who d
(*Whitney* v. *Union*
v. *Sloan* (107 N. Y. 2
e, holding that a purc
t from one who was n
nning with the land
of the facts, is bound
Judge DANFORTH, de
thus: "It is restrictive
o its use."
and should be noted t
ed the line of title and
vendors of the land,
t came from one neve
right from a contract
But why should that
l owner's right rests
stranger to the title
l and worthy of equit

Statement of case.

A policy of marine insurance was issued by defendant
account of whom it may concern, in case of loss, to
poration of which plaintiff was general manager an
all of its stock. The vessel insured belonged to said
policy contained a stipulation that a change of int
should not affect the validity of the policy Pla
behalf of his company, sold the vessel insured to an
Part of the purchase-price was secured by a mort
running to plaintiff, and by the contract of sale it w
insurance should stand and be held for the benefit of
other policies could be obtained. The vessel insured
life of the policy which remained in plaintiff's posse
orally assigned to him its claims thereunder and the
tion, instructed him to collect the insurance. In
by the plaintiff in his own name upon the policy, the
all the facts showing his connection with the transac
vessel and the title to the same, the execution of th
and the agreement in regard to the insurance, and
the loss he held the policy under an agreement betw
interested that it should stand in his hands as an in
case of loss. No objection was made to the proofs of
mencement of the action and no point was raised as
plaintiff either by demurrer or answer. *Held*, that
non-joinder of parties plaintiff was waived (Code Ci
499), that it was the intent of the parties that the pr
of the insurance should be extended to persons who s
acquire, and at the time of a loss have, an inter
insured under transfers from the insured, and so in
of said vendee; that plaintiff as trustee or assignee
entitled to recover such interest as it had in the
trustee the interests of said vendee.

(Argued October 29, 1891; decided December 1, 189

APPEAL from judgment of the Superior Co
New York, entered upon an order made Ma
affirmed a judgment in favor of plaintiff,
verdict and affirmed an order denying a moti

This action was brought upon a policy of
The facts, so far as material, are stated in t

J. Langdon Ward for appellant. The
the complaint should have been granted.

Statement of case.

t the words "lo
' make it impos
r to sue. (*Ennis*
F. Ins. Co., 8
e provision of th
may sue in his o
n whose name a
a trustee of an
ns is made with
Samana Compa
ay be transferre
nt v. *Brisbane*, 2
27, 439; *A. & A*
ns v. *Barkalow*,
o., 109 N. Y. 5(
ell v. *N. W. Ins.*
en taken by the
ught in the nam
plaintiff might h
ty to the suit, or
, and brought a
waived. (Code (
14 N. Y. 368; *
Wickham, 16 H
5.) If the mortg
teamship Samans
n force, and the
hcock v. *N. W.*
o., 9 Bosw. 404;
v. *Porter*, 109
Ch. App.] 149;
Defendant's con
nd that it is not
nstrument by pa
266, 279; *Tyson*
er, 87 id. 466; W
K, 98 U. S. 514;

le, apparel and furniture...
r and boilers.....

ve thousand dollars — sum i
rn *pro rata* premium for eve
if this policy be canceled or
eed that any change of inter
l not affect the validity of t
tiff was the general manage
Samana Company, Limited,
t twenty-five dollars, which
order to satisfy some requi
ne 5th of October, 1888, the
y, entered into an agreemer
behalf of another limited co
ws of Great Britain, for th
for $41,000, a portion of tl
and the balance secured b
e contract also provided th
on the steamer, should stanc
he vendee until other polic
vendee should pay the une
The Banana Steamship Co
nance of the contract the S
vember 15, 1888, by a regul
ntiff as manager of the Ste
ted. On the same day th
xecuted to the plaintiff a n
28,500 of the purchase-mor
e condition of the title to th
During all this time the pc
possession. The Steamshi
l assignment of its claims u
d subsequently, but after
ne company in writing th
its claim to the plaintif

ok this security for t
was the manager a
l the mere form o
and then it is seen t
e was that of the Sa
s of this case, can be
kely that, upon a co
e enough in the case
terest intended to tr
tiff, to recover for th
loes not seem to h
his theory. It is, h
that, at the time of
r an agreement betw
l, that it should stan
case of loss. He
e the contract for th
within section 449 c
of an express trust t
h him the party fo
A person with wh
le for the benefit c
t within the meani
estion was made by
m by name for the
as we have seen, b
nay concern," to its
g by defendant raisi
nder of parties in in
nt of the loss to the
of the case, discharg
to the form of the a
exceptions taken at t
urts below.
ment should be affir
ir, GRAY, J., in result, CARR, C., not voting.
t affirmed.

real and personal property s
as the owner of the lands
ard, and the proportion of t
n on account thereof was $4
of the Seventh ward when t
the 1st of January, 1884, un
t year, he resided in the F
esidence there was open and
wn among his acquaintances.
ust, 1884, the plaintiff duly
amount due for the tax on t
in the assessment-roll, with
ficer refused to receive the s
l estate, and plaintiff has ev
pay the same.
rch 26, 1885, the city treasur
ole amount of the real and
s and expenses added, the
dant and a certificate of the s
by the treasurer. The pl
ad lived in the Seventh war
d with the city assessors, bu
ange of residence, and it di
it when the assessment w
at the plaintiff knew that h
perty in the Seventh ward h
l delivered to the city treasu
to the state of Michigan, in
ce resided. He was the owr
ount of $50,000 when the

lgment in the action set asi
on the personal property of t
e lands made by the treasure

P. Ernst for appellant. Th
perty to the plaintiff in the Seventh instead of the

far as they may affect his i
t may be said that the ass
inhabitants of the city, bu
should be assessed for pe
ney reside, is a limitation
a directory provision, th
ssence of their power.
sisted that assuming the
thereunder, nevertheless
elief, for the reason that th
he point where the presu
e proceedings so as to co
sufficient answer to this
aken on the trial. The d
sale and claimed a lien u
and its denial that the pro
as based simply upon the
d that the sale was lega
dant, if it desired to rais
s of the remedy, to ha

nt should be affirmed.

firmed.

NK NOTE COMPANY, Resp
ATED RAILROAD COMPANY

a open, exclusive and hostile oc
one who entered under a clai
rledge and possible injury of th
apable of vindicating his right
possession, which if undispu
the presumption is not conclu
at serves only to impose upon
ue character of the possessio
to justify a conclusion that
ction becomes at least a mixed

ıe west side of the street constr
was reconstructed; the columı
sixteen inches within the sidev
d by trains drawn by steam e:
premises in question in 188
, air and access of these premi
n 1868, and has been contin
ı, but refused to find that be
ıumption of a grant of the rig
ailroad on the east side of G
id property to the defendan
lusive by lapse of time. *Hel*
endants' predecessor was not
a specific legislative grant, b
at least until the action of t
y and experimental; that wl
e, the changes made in 187
ısly affecting the rights of p
laimed was not identical with
ıdefined and non-separable pa
originally, were also taken t
ɜ to that part, although conti
ıg been so used as an integral
ıre the fate of such users, and
quired, no prescriptive right l
(10 Wend. 169); *Broistedt* v. *S.*

ement of this action defendant
ıcquire plaintiff's street righ
, of record, of title in the plai
ɔnceeding such an admission
ready acquired, it was evide
r of the possession claimed t
unction the court fixed as an
ed for the permanent or fee
ifically awarded as damages
eration of the road. *Held*, er
taken into consideration as a
ternative damages in such a ca
inary proceedings for condemn
is not wholly in the discretio
nly such damages as would b

ds in said city stand wholly u
y are liable to abutting owı
es as result from the invasion

129-636, 129-637, 129-648, 130-340, 131-222, 135-278, 136-512, 138-459.

129 274
141 284
129 274
144 178
129 274
147 145

LAWRENCE LYNCH, Respondent, *v.* THE MET VATED RAILWAY COMPANY et al., Ap

Where a court of equity gains jurisdiction of a cause may retain it generally, and to do complete justice l ascertain and award damages as incidental to the ma

Where, therefore, an equity court assumes jurisdictio tinuous trespass, in order to prevent a multiplici proceed to give full relief, both for the tortious ac damages.

The provision of the State Constitution declaring that: in all cases in which it has heretofore been used, shall r ever" (§ 2, art 1), does not apply to the trial of i equity action, and this, although as incidental to t sought, a money judgment is asked for and issues o which might be the basis of an action at law

In an action to restrain defendants from maintaining road in a street in front of plaintiff's premises in the the complaint alleged the plaintiff's title and owne and to the street in front of his premises, the cons ants' road and the operation of trains over it, the ants to acquire or make compensation for the ca injuries sustained, that they will be constant an that to prevent a multiplicity of suits, to protect damages and to afford complete relief, the plaintiff seek the equitable interference of the court. The p included a demand for the amount of loss and dama ascertained to have been already sustained. When t trial defendants' counsel moved for a trial of the clai by jury; the motion was denied. *Held*, no error for past damages did not have the effect to set it up cause of action, but was simply a demand that the c plaintiff entitled to the equitable relief prayed for, a entire jurisdiction of the action should, as an incide damages which appear to have been sustained dov that the right to a separate trial by jury of this issu purview of the constitutional guaranty.

Murray v. *Hay* (1 Barb. Ch. 59); *Hudson* v. *Car* distinguished.

It seems that if defendants deemed themselves entitle trial by jury of some issue of fact in the action, the them would have been to have applied upon notic (Code Civ. Pro. § 970.)

(Argued October 27, 1891; decided December 15, 189

from judgment of the General Term of the Superior
he city of New York, entered upon an order made
Monday of February, 1891, which affirmed a judg-
avor of plaintiff, entered upon a decision of the
ial at Special Term.
ure of the action and the facts, so far as material,
in the opinion.

Blythe Rogers and *Julien T. Davies* for appellants.
or to deny the defendants' demand for a jury trial
se of action for money damages for past trespasses.
Y. art. 1, § 2.) Plaintiff's right to damages for past
is a separate and distinct cause of action from his
ie aid of equity to prevent future threatened ones.
v. *M. E. R. Co.*, 121 N. Y. 119; *Bell* v. *Merrifield*,
)2, 209; *Secor* v. *Sturgis*, 16 id. 558.) That these
of action are not stated and numbered separately
rial. (*Goldberg* v. *Uttey*, 60 N. Y. 427; *Wiles* v.
34 id. 173.) It is well settled that a plaintiff cannot,
a legal cause of action with an equitable one, deprive
s of a jury trial of the former. (*Davis* v. *Morris*,
569; *Wheelock* v. *Lee*, 74 id. 495; *People* v. *A.*
o., 57 N. Y. 161, 174.) These past damages are
cidental" to the equitable relief as to take away the
ıry trial. (Code Civ. Pro. § 484; *Laub* v. *Buck*-
N. Y. 620; *Rathbone* v. *Warren*, 10 Johns. 587;
Juris. § 796; *Kempshall* v. *Stone*, 5 Johns. Ch.
low v. *Scott*, 24 N. Y. 40, 45, 46; *Sternberger* v.
, 56 id. 12, 21; *Carroll* v. *Diemel*, 95 id. 253;
v. *Warren*, 10 Johns. 587; *G. S. Bank* v. *Sharer*,
409.) Past damages are not "incidental" to the
. (*Murray* v. *Hay*, 1 Barb. Ch. 59; *Laub* v.
er, 17 N. Y. 620, 626; *Lettin* v. *McCarty*, 41
111, 112; *Hudson* v. *Caryl*, 44 id. 553, 554,
ewell v. *N. Y. C. R. R. Co.*, 105 id. 319, 320;
. G. Co., 18 Hun, 274; *People* v. *M. T. Co.*, 11
C.] 304.) The defendants did not waive a jury trial

gal cause of action by noticing the who
al Term. (*Brayton* v. *Sherman*, 11
v. *P. Ins. Co.*, 118 id. 165; *Wheelock*
ckellar v. *Rogers*, 109 id. 468; *Colen*
'2, 574; *Hudson* v. *Caryl*, 44 id. 553,
36 id. 569, 572.) Defendants did not w
oving to have issues framed under sec
Code Civ. Pro. § 1009; *Coleman* v. *D*
; *People* v. *A. & S. R. R. Co.*, 57
v. *See*, 51 id. 300, 305, 306; *Wheel*
500; *Davis* v. *Morris*, 36 id. 569, 57
4 id. 553; *Williams* v. *People*, 24 id.
ssary for defendants to state any gro
for a jury trial. (*Wheelock* v. *Lee*,
wis v. *Morris*, 36 id. 569, 572, 57
4 id. 553, 555; *McKeon* v. *See*, 51
ropriateness of juries for determinin
ated damages, has always been recogniz
pson, 1 Johns. Ch. 131; *Halsted* v.
17.) The whole judgment should be
ely the decree for past damages. (C
72.) It was error to award damages f
property which were in the possessi
v. Pro. § 993.) The theory that equit
his suit in order to prevent multiplicit
which that for past damages was on
e ground was solely to prevent fut
Inj. [2d ed.] 450, § 700; *T. & B.*
T. & W. R. Co., 86 N. Y. 107; *Galwa*
N. Y. S. R. 145.) The supposed anal
rk and copyright cases has no pertine
s. § 1352; 1 id. 227, 228; *Coleman* v.
Code Civ. Pro. § 484; *Murray* v. *Ha*
b v. *Buckmiller*, 17 N. Y. 620; *Hu*
07; *Cogswell* v. *N. Y. C. R. R. Co.*
. *F. D. D. Co.*, 112 id. 263, 269; *T*
316, 322.)

Gibson Bennett for respondents. Within the uity jurisprudence and pleading, as establishe n of the Constitution, the complaint contai ɔendent cause of action, the claim for past dam y relief, which the Superior Court, exercising he late Court of Chancery, had jurisdiction t ster as incidental to the main relief. (*Russe* ranch, 69; *Armstrong* v. *Gilchrist*, 2 Johns. *McCann*, 7 Paige, 451; *A. M. Co.* v. *Spe* ; *Watson* v. *Hunter*, 5 Johns. Ch. 169; *Smi* r. 379; *Williams* v. *N. Y. C. R. R. Co.*, 16 I *rd* v. *M. R. Co.*, 117 id. 442; *Watson* v. *M* & S. 137; *Campbell* v. *Seaman*, 23 N. Y. *ng*, 58 Barb. 20; Code Civ. Pro. § 969; *Hut* 3 Barb. 251; *Hess* v. *R. Co.*, 29 id. 291; *utnam*, 16 id. 465.) The appellants are not insist that it was error to deny their motion (*Uline Case*, 101 N. Y. 98; *Pond Case*, 11 Civ. Pro. § 969; *McKeon* v. *Lee*, 51 N. Y. v. *Rogers*, 109 id. 458.)

This action was brought to restrain the ma peration of the defendants' roads in front of emises, and the prayer for such a judgment incl id for the amount of loss and damage which m ed to have been already sustained by the plai int sets out the title and ownership of the pla its in and to the street in front of his premises of the elevated railroad and the operatio it and the annoying results therefrom; the il orized nature of the trespass upon the plain d easements, and the failure of the defendan to make compensation for them; the injuries that they will be constant and continuous, , to prevent a multiplicity of suits, to pr parable damages and to afford complete relief compelled to seek the equitable interference o

court. When the action came on for trial, the
counsel moved for a trial of the plaintiff's claim f
ages by jury, and the exception to the denial of
raises the main question presented upon this appe

The clause of the Constitution, upon which the
a jury trial was based, reads: "The trial by jury,
in which it has heretofore been used, shall rem
forever." The argument for the appellants is, i
that there were two independent causes of action
complaint; of which one was for past damages, wh
the Constitution of 1846, was cognizable solely i
law, and that under the Code it comes within the
diction of the court only by reason of the permi
in one complaint legal and equitable causes of
section 970 of the Code of Civil Procedure, whic
enactment, it is provided that "where a party is
the Constitution, or by express provision of law, t
jury of one or more issues of fact * * * h
upon notice to the court for an order directing a
tions arising upon that issue to be distinctly and p
for trial accordingly," whereupon the court must
If the defendants believed that they had a constit
to a jury trial of some issue of fact in this actio
have been the natural and orderly way for them
application to the court under this section. Th
appears to be but one consecutive narrative of
upon which the equitable interference of the cou
to be necessary. The pretense that there is a se
of action rests only upon the demand of the comp
if he is entitled to the equitable relief of an inj
court shall adjudge to him such an amount for
tained by the defendants' acts as shall be ascertain

Undoubtedly, the claim for past damages, sustai
tiff in his property rights from the defendants' acts
been made the subject of an action at law; but t
the cause of action which the plaintiff elected to
complaint and to bring to trial. What he attemp

was to restrain the continuance of ac
injuring and would, to all appearar
ture continue to injure him, in ways
e described in his complaint. That w
dable and cognizable only on the eq
Jence, as upon the face of the comp
a cause of action for equitable relie
eived that they were entitled to a tria
fact involved in the statements of
ht have moved the court under sect
estion could have been opportunely a
ellants cite upon this point the de
n (50 N. Y. 572), but that was made
was a new provision and was enacted
the effect of the omission to take th
e need not determine it now; inasmu
ve reached holds the right to a sepa
e amount of past damages, in such a
the purview of the constitutional g
ne purely for a court of equity; for
an injunction against the defendants,
aintaining and operating their eleva
sertion of this ground for the equita
urt, the facts in the complaint were ma
ity for granting that species of reli
complaint was framed and calculate
one cause of action stated in this co
e claim for relief against the contin
mplainant's properties. The demand
d in the prayer for judgment, does
up an independent cause of actio
an a demand that the court, having a
itled to the equitable relief prayed
entire jurisdiction of the action, will
ppear to have been sustained down to
been a well-settled and familiar rule th
gains jurisdiction of a cause before it

in it generally. To do cc
a court of equity will furt
e of ascertaining and awar
ething which is incidenta
e this is done on the gr
ge done is deemed to be in
the principle is in perfect
isdiction of a court of equ
terferes to restrain a tre
ire, in order to prevent a
isdiction of the cause for s
he end and close up all m
parties by assessing the
.t has restrained.
actice of courts of equty
by Judge EARL in the cas
rch v. *Oliver Street Bapt*
en they have once obtained
ll the relief which the nat
d, and to bring such relie
between the parties."
money judgment is order
intiff's loss affords no pecu
risdiction. That is freque
tioned equitable nature.
Rensselaer v. *Van Ren*
th respect to an objection
ity that the final relief woul
uld not in that manner lose
uitable character. The jur
it retains to the end, even
ate relief is reached by a n
not an uncommon occurren
nent in which a court of
y as an incident of the gra
re does not suffice to qualif
ve should consider the qu

the authority of several
of *Williams* v. *New Yo*
N. Y. 97), the opinion
EN. That was a suit in e
nts from using the stree
damages for past use.
sed in the opinion, was
n constructing their road
antable intrusion and t
and that he is entitled to r
w for the trespass, yet, a
re, he had a right to con
its restraining power, to
can, of course, recover
uitable relief. There ma
n this suit the damages up
use as to those lots there
relief, and to permit th
in effect, deprives the d
ssessed by a jury. But,
it is unnecessary to consi
gs to be noted in that
ges already sustained wer
t of equity to award, as
action. This idea is, in
to the lots which had be
ourt regarded its right to
ected with, or dependent
itable relief; that is to s
by the decree of the
damages caused to it cou
that portion withdraw
because not the subject
It is very obvious that
s to the right of trial
be noted that the opini
nages. This definition of

damages seems to me to put the action of t
h just what courts of equity have always do
ich they have gained jurisdiction; that is t
d to inquire directly, or by reference, or oth
nages sustained and assess them accordingly.
same case, entitled as *Henderson et al.*, aft
ne up again (78 N. Y. 423), the opinion o
ivered by Judge DANFORTH, who again uphel
ht to invoke the equitable power of the cour
could, "of course, recover his damages as in
uitable relief;" and he stated it to be "
neiple" that "when a court assumes jurisdict
vent a multiplicity of suits it will proceed to
h for the tortious act and the resulting d
nion was carefully written and based upon t
ny cases.
Recently, again, in the case of *Shepard* v
7 N. Y. 442), it was said of these acti
re necessarily "on the equity side of the
in relief sought was the injunction against tl
l that in them the complainants could "recov
y have sustained as incidental to the grantir
e relief." This view, as stated in that opinior
ed upon the *Williams* and *Henderson* cases
posed equitable principles governing such a
The *Shepard* case, somewhat conspicuously
vers a court of equity may arrogate to itself
completely determining and quieting the que
on it has once acquired jurisdiction of the actic
hat respect, a rule long established by author
t in these cases the right to demand a jury
nages was not precisely, or in terms, stated as
anced; but that, as it seems to me, would be
sion of the effect of the opinions delivered.
r the nature of such actions and deliberatel
ver of the court in equity, as an incident of
njunction, to assess the damages sustained.

. *Osborn* (102 N. Y. 552), the court certain conveyances as fraudulent, g f prayed for, and, in addition, decre pon the land for some unpaid installm ment of which the defendant had ob agreement. Chief Judge RUGER de is court in affirmance of the judgme ciple has been applied in many ca it for pecuniary damages, even wh quate remedy at law, if the damage ransaction over which the courts had rpose; although for the purpose of col hey would not have had jurisdiction nciple declared by him, the learned nity Jurisprudence (§ 181), and variou nfusion of thought concerning the co a trial by jury may arise in a misapp er application. That provision relates act in civil and criminal proceedings held by the chancellor in the case of *S. Railroad Co.* (3 Paige, 45). Wh eeding presents for determination a qu trial by jury is proper and can be in ght to restrain the commission of tres us in their nature, is necessarily in erferes, to prevent multiplicity of sui lief by way of an injunction The qu rmination in such an action is one facts to be established upon the tri to such relief. Upon the proofs, sh respasses, and the consequent injury perty, the court decides the questi an injunction. It does not seem id that any issue of fact as to d as necessarily decided in the actio to fix its amount; and I do not thi ision was aimed at such a proceeding

defined by the chancellor in the case above seems difficult to rationally give it an applica simply an assessment of the damages.

I may extract, and may appositely quote her Judge ANDREWS in his opinion in *Cogswell* v. *N. Railroad Company* (105 N. Y. 319): "We thin is a reasonable rule, and one in consonance w ities, that where a plaintiff brings an action for equitable relief, in respect to the same cause of presented is not one of right triable by jury un tution." The case was one wherein the plain demanded judgment for damages and an a nuisance, and also for an injunction against i The learned judge's opinion is upon the quest such an action was one for a nuisance, under sec Code, which must be tried by jury, unless waiv and he held that it differed from *Hudson* v. *C* 553), which was a common-law action, in that e by way of injunction was asked, and not sim obtainable by writ of nuisance for damages and His remark upon the right to a jury trial in eq is not out of place, however, here.

To carry this discussion backwards, and to to decisions of this court, we find warrant in th held by our own and the English chancery cou that a trial by jury was not usual in cases whe acquired jurisdiction, and that the court would the relief which the facts warranted, including and awarding of compensation for injury a *Watson* v. *Hunter* (5 Johns. Ch. 169), the l enjoin the cutting of timber and to restrain that which had already been cut. Chancellor the relief of injunction to the timber standing, as to the removal of the cut timber, on the would be an application to an "incidental reme that "the practice of granting injunctions in ca to prevent or stay the *future* commission of w

aste already committed is merely
)n in the other case, assumed to p
s and to save the party the necessit
;w."
ellor's exposition of the principle
cases of waste, obviously, is as app
If the action at law in trover was dec
ersonal property already converted
ecessary in such an action as thi
)ss sustained from the trespass. T
n case relied upon the practice fol
cellors. Lord HARDWICKE, in *Gart*
38), had held that the decree for the
as an incident to the injunction
n *Jesus College* v. *Bloom* (3 Atk. 2
for an account and satisfaction for
d no injunction was prayed for, Lor
bill was improper and that an act
edy. He asserted the rule, howev
or an injunction to prevent waste,
nitted, the court, to prevent a doub
nction to prevent future waste a
satisfaction for what was past. He
iplicity of suits the court will, on bi
complete decree and give the in
)r what had been done, and not
r action at law. In the subsequent
Atk. 381), the same lord chancellor
); as did also Lord THURLOW in *Le*
quote a remark of Lord NOTTING
3 Ch. Cases, 201), that when a Cour
ed possession of the cause, if it can
, it will not be the handmaid of
suit to be ended elsewhere."
mer Court of Errors, Chancellor
n *Armstrong* v. *Gilchrist* (2 John
in 1800), that "the Court of Ch

quired cognizance of a suit for the purpos
unction, will, in most cases of account, wh
session of the merits and has sufficient ma
ain the suit in order to do complete just
rties and to prevent useless litigation and
e was upon a bill for specific relief and to
law brought to recover the value of certain
set up certain equitable considerations as a
a recovery in the other action. The
cided against the whole relief sought by the
favor of the defendants that the complain
em the value of the stock and ordered a r
e account. This procedure the Court of E
ing right and the duty of the chancellor to
I do not consider the cases cited by the ap
controlling upon the question. In *Murra*
L. 59), the bill was filed by two persons, wh
ferent dwelling-houses, in severalty, having
either of them, to restrain a nuisance whic
t not a joint, injury to both complainants.
the prayer for an account and compen
spective damages was upon the ground of
d so considered. Another case of *Huds*
Y. 553), was an action to recover damag
wing of plaintiff's lands and to compel the
m; and the decision turned upon the ancie
al, in such an action of nuisance, which th
ected. It was not an action in equity to re
nich, according to Judge ANDREWS' opinion
e (*supra*), would not be an action for a n
the Code to be tried by jury.

But the judge who delivered the opinion o
e Commission of Appeals, in *Hudson* v. *Ca*
his remarks upon the general right of tria
inion indicates, for he says (p. 555): "Bu
said or decided in regard to the trial of
nich two causes of action, one exclusively of

le cognizance, arising ou
, this action should, for a
l by jury, and that is, tl
double object of removin
nages occasioned by it, w
ceeds to refer to Blacksto
As, therefore, "a case i
has been heretofore used
s error to refuse it.
me necessary to pursue fı
es. The respondent's co
ower courts. In a note t
be found reference to otl
e United States Supreme
ule, that when the Cour
of a cause for one purpos
" Underlying the syste
exercised their power, as
when they have gained
the infirmity of the co
full relief, they will retai
and settle up the whole n

question here at consider
settled by careful judic
ble and commendable as
a the disposition of lit
be shaken by doubts. T
st reach is that, in this
le and constitutes a claim
mixed up with it a cause

a basis for an appeal t
ver may well have consti
ight have been set up i
eration cannot affect no
action itself.

; error, therefore, to deny the motio
st damages, and the court could co
e trial of the cause in equity.
other point, presented to us upon
rror to award damages for portions
in the possession of tenants. As t
ontrolled by the decision of the *K*

nent should be affirmed, with costs
r, except EARL and PECKHAM, JJ.
affirmed.

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ter of the Voluntary Dissolution
NT SAFETY FUND ASSOCIATION of N

t has power, in proceedings for the volu
ion, to decree a distribution of its funds
it may not take from a trustee funds plac
on for a specific purpose, pursuant to a co
tribute them through its receiver instea
latter is, notwithstanding the dissolutio
the trust fund, and the authority of the
be trustee to distribute the fund, as pro
under the supervision and orders of the
re, a life insurance association, which prop
membership to those becoming members,
cate that certain sums received thereon sh
npany, as a safety fund for the security of
y the trustee in the manner specified, en
a trust company, by which the latter agre
d and pay it out in the manner and fo
, that the court had no power, on a volu
ation, to order said trustee to pay over
pursuance of the agreement, to the recei
ngs.
he question was not affected by the fact th
e fund belonged to the association, subjec

t. v. *G. M. Life Ins. Co.* (77 N. Y. 272), di

Statement of case.

pany, in pursuance of a Special Term order, made without paid over the fund to the receiver. *Held*, that the payment ıntary, so far as to preclude the company from moving the uire the receiver to pay back to it so much of the fund as d in his hands.

ad, in good faith and under the direction of the court, paid ı of the fund, before the making of the motion for an order n to pay it back, in the making of which there had been on the part of the trust company. *Held*, that he was entiolected in these payments.

e so made by him to the attorneys in the dissolution pro- their fees. *Held*, that an order was proper requiring said pay back to the receiver the moneys so received by them, g him, upon receipt thereof, to pay them over to the trust

vember 30, 1891, decided December 15, 1891.)

rom order of the General Term of the Supreme e first judicial department, made April 6, 1891, .ed in part and reversed in part an order of Special above-entitled proceeding.

gs by petition to the court were taken in behalf of of the company above named, to provide for its ssolution. The matter was referred to a referee, d that it would be unwise for the corporation to siness, and that it should be dissolved. A motion n behalf of the petitioners to confirm this report al order for the dissolution of the company and nent of a receiver of its property, as provided by e notice of this motion was served upon the eral and the superintendent of the insurance and some others who had made themselves parroceedings, but no notice of any application to the ven the Farmers' Loan and Trust Company, one lants here.

hearing of the application above noticed, the report e was confirmed, the corporation dissolved, and ry was appointed the permanent receiver of all operty, things in action and assets of the corpora- Farmers' Loan and Trust Company was in the

same order directed to turn over, transfer and
receiver all funds, securities and property receive
the corporation, or held by it under or by virtue
tract made between it and the corporation, in tı
wise, for the members of the corporation. The re
a copy of the order on one of the officers of the ir
demanded or requested payment by it to him of a
or property it held of the dissolved corporation, i
with the provisions of such order. The officer o
tion upon whom the copy order was served and o
demand was made, complied with its terms and
the securities, amounting to about the sum of $1
it held *in trust* for the members of the dissolved
who were holders of certain of its certificates.
having taken possession of such securities (whic
tered United States bonds), had them transferred
and subsequently they were sold under direction
and a portion of the proceeds paid out by the re
orders of the court and in good faith, in reliane
authority.

A portion of the money was paid to the attorn
carried on the proceedings to obtain a dissolutio
poration, for payment of their services therein, at
referee's fees in such proceedings and other di
Another portion was paid for counsel fees to re
counsel. The amount of money paid out by hir
orders of the court was $2,852.16, and the t
received was $11,203.44, leaving a balance in his
funds received by him from the Farmers' Loa
Company of $8,353.28.

Subsequently the trust company applied, on
receiver, etc., for an order to compel the receiver
moneys which he had obtained from the trust c
the ground of the application was that the tru
had no notice of the application for the orde
emptorily requiring it to pay over such funds, an
not a voluntary payment, and that it was entitled

Statement of case.

to the end that its rights and thos
the fund might be protected.
cial Term ordered that the money
st company, regardless of what
ade had the trust company or t
trust agreement been notified an
the attorneys and referees to repa
ts they had been respectively paid
the attorneys and referees appeal
n this order, where the provision
ay to the trust company was reve
attorneys and referees to repay
d. The trust company and the a
ed from the order of the General
facts appear in the opinion.

for The Farmers' Loan and Trust C
der divesting the trust company
trust was improvidently made, the
the proceeding or having notice.
R. Co., 46 Hun, 552; *Parker* v.
High on Receivers, § 168; *Reb*
341.) The fund in question was
ome Provident Safety Fund Ass
disposed of by said company an
trust company, and the receiver
n of the property. (*In re G. M.*
Ruggles v. *Chapman*, 59 N. Y.
ley, 88 id. 234.)

ge for Hastings & Gleason, appell

on for Jackson & Burrill, appellan
al Term by Mr. Justice O'BRIEN, da
viewed by the General Term, wa
0, chap. 537, § 4; Laws of 1882, ch

or respondent. The receiver, u
ntitled to the funds in the hands

s' Loan and Trust Company, which
er to him, and the order of the General
er of the Special Term, which directe
unds, is valid. (Code Civ. Pro. §§ 1
419, 2430, 2431; *Atty.-Gen.* v. *G. M.*
77; *Iddings* v. *Bruen*, 4 Sandf. Ch.
eld, 1 Hogan, 234; *Davis* v. *Duke of*
108; High on Receivers, § 1; *Tra*
543; *Atty.-Gen.* v. *N. A. L. Ins. Co.*,
Thompson v. *Brown*, 4 Johns. Ch.
p, 2 Paige, 319, 320; *Innes* v. *Lan*
tt v. *Kerr*, 48 N. Y. 42; 2 Daniel's
Bliss's Code [3d ed.] 2003; Code Ci
yment by the trust company to the re
knowledge of all the facts, and was
nce it cannot be recovered back. (*Re*
N. Y. S. R. 917, 919; *Tripler* v. *M*
Brisbane v. *Dacres*, 5 Taunt. 143; *Si*
159; *Preston* v. *Boston*, 12 Pick. 14.)
mers' Loan and Trust Company were
ds which they had voluntarily paid
d to them, the Special Term order w
allowing the receiver the several and r
d and incurred between the date of hi
and the making of the motion for the
months; and the order of the Genera
erefore, clearly right. (*Lange* v. *Bene*
t. 12; *Lange* v. *Benedict*, 99 U. S. 68;
l. 165.) It does not appear that the
rm was made on notice to the attor
hat order is void under the statute, a
d by the General Term on that ground
V. Co., 38 Hun, 138; *Johnson* v. *Stag*

CHAM, J. It must be assumed that the
hich has been dissolved had the pow
tract which it did execute with the F
ompany, for no party to this dispute qu

1884, the trust company and the insurance company to an agreement by which the insurance company leposit with the trust company moneys under these .ces: The insurance company proposed to issue to coming members of its association certificates of ip, and in such certificates it would state that in on of the sum of ten dollars to be received on each nd dollars of the amount of each certificate from holding the same, it would pay such sum to the any, as trustee, for the purpose of creating a safety paid out by the trust company under the circumted in the certificate. A like statement as to the f one dollar for a tontine pension fund was to be ach certificate and to be paid as stated.

etails were set out in full in the agreement with the pany, as recitals of the obligations the insurance vas under to its members holding such certificates, the two companies agreed each with the other that nce company would pay to the trust company these nd the trust company would keep and pay them in r and for the purposes stated in the agreement.

nderstood that the funds belonged to the insurance subject to the trusts provided in the agreement. company was to receive, hold, manage and deposit paid to it, in a manner provided for in detail. It est the moneys as fast as it could in U. S. bonds, in its name as trustee, and accumulate the fund interest until it amounted to $300,000, when the terest, in case no default were made by the insurance was to be paid to it. In case of failure on the part urance company to perform its obligations entered its members who held these certificates, then the pany was to convert the securities into money and same in accordance with the recited agreement conhe certificates and reiterated between the insurance companies in their agreement.

ments required in the agreement to be made by the

mpany to the certificate holders after defa
ns of the agreement to be made at the
or of its successor.
cient has been set forth in regard to this a
at the trust company was the trustee of
y the insurance company, which the form
to dispose of in a particular way before th
rance company, while after that event the
greed to apply the fund in payment of the
insurance company to its certificate holders
first question which here arises is as to the p
pon proper notice and hearing, to take th
hands of the trust company and administer
rumentality of its own receiver.

have that power, it would seem rather su
e fund back to the trust company for the
through the mere form of notifying th
ntended application to compel it to pay th
eceiver. The trust company gave notice to
would apply for an order to repay the mon
papers the grounds of its application wer
eiver appeared in obedience to the notice
nigh he claimed were sufficient to warrant t
g the fund to be retained by him. The n
ion and the papers used upon the heari
therefore, be regarded as sufficient to const
o all parties served and a hearing of them
the court could make a final order for the
d by the receiver, if it had the power so t
scretion it thought it best.
es not appear to us that the power exists.
the right of the court upon dissolution of
to decree distribution of its funds among
s, or policy or certificate holders, who may
. This is a different power from the takin
rt from a trustee the funds placed in his
ecific purpose by the dissolved corporation

the fund through its receiver instead of through
The trustee is still entitled to the possession of
ıd, as provided for in the contract which had been
that contract is to be the measure of its liability
de for the discharge of its duties. When by the
f the corporation, a default has occurred in the pay-
iabilities to the holders of the certificates, the duty
e under the contract still remains. The company
ılted and dissolution having taken place, and so
y of the court having come into play, that authority
to be confined to compelling the trustee to dis-
fund as provided for by the contract and under the
and orders of the court. I see nowhere any
the court to itself take possession of the fund
ayment of which the trustee was itself charged
by virtue of a valid contract, the obligations of
remained as against the trustee. Certainly, the
trustee to retain its possession is as strong where
on a valid contract, as in the case of a trustee
ıtatute.

n the case of a statutory trustee, it has been held
t several times, and after full argument, that it had
take the securities from the statutory trustee and
ver to its own receiver for the purpose of distribu-
ing to the conditions of the trust, among the cred-
insolvent and dissolved corporation. The case of
Receiver, v. *Chapman, as Superintendent of*
was the first of a series of cases tending in the
ove mentioned. It was first reported in 1 Hun,
plaintiff was the receiver of the Eclectic Life
Company, appointed by the court pursuant to the
f the Revised Statutes, and in the exercise of its
ırisdiction, and at the suit of a stockholder and
establish the insolvency of the company, and pro-
tribution of its assets. By section 6 of chapter
Laws of 1853, it was provided that no insurance
f the class of which the Eclectic was one, should be

l with a less capital than $100,000, n
. with the comptroller of the state the su
or securities, and such stocks or securi
he comptroller as security for the po
pany. But it was provided that, as lo
depositing these securities should conti
permitted to collect the interest or di
so deposited, and from time to time t
securities on depositing with the co
; of like character.

the creation of the insurance departm
omptroller were transferred to the sup
artment. The Eclectic Company
of securities, in accordance with the
d. It became insolvent, and at the su
r was appointed, and he demanded the
ose of making distribution among the
ompany. The superintendent refuse
, and an agreed case was submitted
bodying these facts, and the court hel
t was not bound to hand over these
appointed by a legal tribunal under th
the benefit of general creditors; tha
osited as a special fund for the securit
primarily, and that their rights could
rintendent in the manner pointed out
hich is the General Insurance Corporati
om that judgment to this court, it wa
t held that the receiver, under the p
Statutes, had no authority to require
t of the insurance department the sec
by the company as security for the
. to the provisions of the act above me
ation of insurance companies. It wa
d no power to compel the superinten
imposed upon him by that act. The
s delivered by JOHNSON, J., who, in th

put this very case, and setting aside the official
id the statutory sanction of the trust, he said that
d on contract alone, it is difficult to see on what
ourt could assume into the hands of receivers, prop-
y held in trust, in the absence of misconduct on
the trustee. Mortgagees in trust could not be com-
eld to receivers representing creditors at large."
l judge then stated there was a difficulty in the way
zing the two independent schemes of dealing with
ent insurance companies, such as a proceeding by a
procure a distribution of the effects of such a com-
g its creditors, and that provided by the statute of
y the attorney-general for the purpose of a dissolu-
ch distribution. He said that the legislative power
nvoked to provide such harmony, as the court was
o it.

ent to that decision an act was passed in relation to
mpany, known as chapter 337 of the Laws of 1875,
claimed on the part of the receiver of the company
was given to him thereby to take, and that it was
duty of the superintendent to deliver to him the
n the hands of the superintendent for distribution
iver according to the conditions of the trust. The
l General Terms of the Supreme Court were of that
nking and directed that a mandamus should issue
plication of the receiver against the superintendent,
g him to deliver to the receiver the securities in
An appeal was taken to this court, where the order
ndamus was reversed, and it was held again that no
ed in the court to make such an order originally,
ne legislature did not confer it by the act of 1875.
n was reiterated that the superintendent was acting
e and that the good faith of the state was pledged
ficer should hold the fund for the benefit of policy
thout its being subject to the hazard and expense of
o a receiver. The case is reported as *People ex rel. Chapman* (64 N. Y. 557).

s such trustee, and thus two separate
ceedings were held to be necessary in ord
unds of the insolvent company. An ap
that determination to this court and an exa
ed record on file in this court shows that
ere presented fully by the briefs of the r
after argument this court affirmed the
Term and held in accordance with th
ready quoted. The decision upon the
74 N. Y. 617, in the memoranda, no opinio
l.

estionable that the securities in the hand
ent were always the property of the comp
given by the statute to change the securi
were substituted of equal value. The
eement in question in the case at bar,
g to the party of the first part, viz., the i
bject to the execution of the express t
e agreement, does not alter the questi
rust fund so situated passes to the receive
or remains with the trustee. In each cas
rustee and that of the trustee by virtue of
und placed with such trustee as security
the insurance company so depositing i
; was subject to the trust created, the one l
er by agreement; and I do not see that
wer in the case of the trustee by contra
se of the official trustee, to take from th
former securities placed with it by virtue
which it had entered into with an insura
nently dissolved by the court.

of *Attorney-General* v. *Guardian Mut*
N. Y. 272) is not in point. The questi
een the right of a receiver appointed in a
y the attorney-general to dissolve the cor
e an action to recover the assets of such
l to have been fraudulently disposed o

enjoin the further prosecution of an action b same purpose by a creditor or stockholder of before the appointment of a receiver. It w receiver so far represented the creditors and the corporation, that he had a right to comme recover these assets, for the recovery of wh had, before the receiver's appointment, comme and that the receiver had the right on motion the attorney-general, to enjoin the creditor fr prosecution of his action. No question arose right of the trustee of a fund placed in his or it the fund and make distribution under the orde as is contended for herein by the trustee.

The other cases cited by the counsel for the touch this point.

We think, therefore, that the court was w make the order directing the transfer of the trustee to this receiver, and that it should vac and provide for the repayment to the truste received by the receiver. Some ground is refusal to make such an order on account of th tary character of the payment by the trustee We think upon the facts found the payment tary so far as to preclude the trust company f the repayment to it of the money still in t receiver.

Some embarrassment is created herein by th receiver has, while the fund was in his pos faith paid out a portion of it under the directi We think he should be protected in these pa the attorneys to whom any portion of the m should be compelled to pay it back to him, an thereof, he should be directed to pay it to the which he has paid out in other matters and und of the court, he must be allowed for in his a the trust company. There is some degree of on the part of the trust company itself. The

r it to the receiver of the fund in i
possession quite a number of days bef
fund was paid to the receiver in acco

It is possible that with reasonable
ı of the paper by counsel would hav
y of the fact that there was at least
e order of the court, made without
the part of the trustee, providing for
to the receiver, was valid, and steps
er in some form might at once have
which, so far as appears, the trustee
king toward a review of the order and
until the 3d of December, 1890, a p
onths. Under these circumstances th
ost to protect its own officer in the
l in good faith under its orders, alth
payment should not have been mad
sults from these views that the trust
r proceeding which may be taken look
this fund, and that it has the right
ereof under the direction of the court.
r of the General Term should be rever
Special Term providing for the repay
by the receiver to the trustee, shou
ecting the receiver from a repayment
t by order of the court until repay
me part thereof is made to him. No
wed in this court.

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accordingly.

WILLIAM BARRY, Respondent, *v.* OKSON C Impleaded, etc., Appellants.

A conveyance, absolute upon its face, may be shown b evidence to be in reality merely a security, and t essential to show fraud or mistake in the inception of

Plaintiff, being the owner of several letters patent for and being indebted to defendants, entered into a con which, to secure the payment of that indebtedness and agreed to be made by them to him, he assigned to the interests in said letters patent and the invention co said indebtedness and advances to be paid out of pla profits and proceeds of sales of the patented articles the right under the contract to terminate it at any ti to retain their interest until they were fully paid, and t they agreed to re-assign In an action to compel a re- an accounting it appeared that plaintiff, before the contract, executed to defendants, without considera terms conveying to them, for a nominal consideratio interest in one of the letters patent. *Held*, the evide ing that the transfers, both the deed and the assignm merely as security; and that plaintiff was entitled upon payment being made to defendants as specified

By the interlocutory judgment an accounting was orde ing before the referee it appeared that plaintiff at and upon their promise to pay him for his time, perf fecting improvements to one of the patented inve plaintiff was properly allowed upon the accounting th

(Argued December 4, 1891, decided December 15, 18

APPEAL from judgment of the General Supreme Court in the fourth judicial depa upon an order made July 29, 1889, whic affirmed as modified an interlocutory judgm plaintiff entered upon the decision of the c Special Term, and from judgment of the sam entered upon an order made February 3, 1891, and affirmed as modified a final judgment in f entered upon an order confirming the report whom it was referred by the interlocutory ju an accounting between the parties.

ught this action to compel the defendants to
. certain interests which they had acquired in
ssued to him for inventions, etc., and for an
ween the parties.

had invented an improvement in door hangers,
a machine for stripping willows and a post-office
ratus. He was somewhat in debt to the defend-
ctober, 1884, to secure to them the payment of
es, as well as to make a provision in the future
goods, etc., for his support and for some moneys
achine, he entered into a contract with the
o were engaged in the grocery business. By
aintiff assigned to the defendants two-thirds of
his inventions or patents, and the defendants
nish funds for manufacturing a certain trial
o furnish to plaintiff goods and provisions "so
all be satisfied with the success of the manufac-
rying forward the business under said inven-
after specified and limited, together with ten
nth for house rent and necessary fuel for said
ntract then goes on to provide that out of plain-
he profits and proceeds of sales should be paid
ions and his indebtedness to defendants, as it
ring the continuance of the contract. It is
vided that in case the defendants become satis-
months "that it will not be profitable for them
eir interest in this agreement in and to the
of the articles under said inventions, or in the
' their obligations, they shall have the right to
greement, and the same shall become inoperative
hall retain their interest and claims therein till
lly paid their said indebtedness up to such time
rminate this agreement, but they shall, upon
m of their said indebtedness, reassign their said
l inventions" to the plaintiff. Subsequently,
minate the agreement was extended by agree-
1, 1885. In the month of April following the

xecuted and delivered
ng to them two-thirds
ngers, which was reco
tion was given for th
age was nominal. On
o continue the arrang
sequently refused to re
l satisfaction of their
s was offered them.
ded that the transfers
security for the repay
ied in the contract, and
lefendants, they should
is patents, acquired
irected an accounting t
ers covered by the cont
ed by plaintiff at de
balance was found res
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eived by them.

appellants. The final j
e theory that the $1,18
fendants within the sco
of October 2, 1884.
McNaughton v. *Osgoo*
v. *Wynkoop*, 53 Hun,
owledges a valuable
of evidence which fal
dence for the purpose
of the deed. (*McCre*
n Deeds, § 834.) The
nts the absolute estate
defeasance. (*Taylor*
r the parties be deemed

r mortgagor and mortgagee, the rule with regard res in improving the property is as follows, to mortgagee, "if he has got the consent of the r has given him notice in which he acquiesces, be allowed for the sums of money which he has creasing the value of the property." (*Wetmore* 0 How. Pr. 51; Story's Eq. Juris. §§ 655, 1016, *Prentis* v. *Jansen*, 79 N. Y. 478; *Green* v. *Put-* 500; *Michael* v. *Delaye*, 17 N. Y. 80.) Equity ive the defendants of both the expenditures and vements resulting therefrom at the suit of either r mortgagor. (Story's Eq. Juris. 1016.)

dwin for respondent. A witness was allowed to drew the deed in question and was employed by to do so, but his evidence as to the communica- him by the plaintiff was excluded on the ground privileged under section 835 of the Code of Civil Such ruling was not error. (*Root* v. *Wright*, 84 *Williams* v. *Fitch*, 18 id. 550; *Yates* v. *Olm-* 332; *Loder* v. *Whelpley*, 111 id. 239; *Westover* . *Co.*, 99 id. 56.) The defendants' point that there findings, or any settlement of the final judgment judge, as required by section 1231 of the Code of ure, and that, therefore, the judgment is unsup- well taken. (Code Civ. Pro. §§ 1018,1019, 1022.)

The facts, which have been stated, sufficiently positions of the parties and enable us to review the which the appellants' counsel has argued here. the patent deed, conveying an interest in the ed, was absolute, and that the evidence did not jus- that it was for security only. His argument is, as no fraud was found, or practiced, in respect to parol evidence could not destroy the absolute he conveyance and equity was powerless to attach nce. If the deed of this particular patent inter-

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decided December 22, 1891.

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for appellant. The re
. 461, Laws of 1871), i
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aws of 1871, chap. 46

N. Y. 183; *Remsen* v
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them. (Laws of 1882,
15; *Ensign* v. *Barse*, 1
s., 122 U. S. 154; Const
.4, § 1; *Stuart* v. *Palm*
t, 100 id. 585, 587; 1
N. Y. 227; *Cromwell*
v. *Anderson*, 95 U. S.
id. 97, 104; *Hager* v. *I*
lmer v. *McMahon*, 133
ater-rates were assessed
invalidity of the water-
n 10 of chapter 656 of t
p. 461; Laws of 1875,
100, § 4; Laws of 18
N. Y. 188; Laws of 18
is not barred by the
82, chap. 383, § 11; Law
. *Pinkney*, 81 N. Y.
Rexford v. *Knight*, 11

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ffalo, 82 N. Y. 204; *Co*
Hunt, 3 Den. 274; *Len*
inson v. *A. & S. R. R.*
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N. Y. 261; *Spe*
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L. R. Co., 7]
Rep. 395; Coole
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ins v. *Kay*, 51

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Statement of case.

ex rel. v. *Spicer*, 99 id.
Slauson v. *City of Ra*
N. Y. 234; *People* v.
5 id. 540; *Wynehame*
Dausman, 28 Wis. 54
Tate v. *Pugh*, 43 Ohio
136; *People* v. *Coc*
15 Barb. 131; *People* v
49 N. Y. 335; *In*
st. Lim. 180.) The act
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v. *Bd. of Supvs.*, 67 N
15; *East St. Louis* v.
McCauley, 15 Cal. 430;
Pacheco, 27 id. 175; *G*
v. *May*, 9 Col. 404,
; *Law* v. *People*, 87 i
stitutional and void by
, § 16; *People* v. *Hil*
38 id. 193; *People* v.
Council, 13 Abb. [N. S
ople v. *Allen*, Id. 418
Town of Flatbush, 6
banks, 65 id. 588; *In*
id. 497; *Astor* v. *A. I*
F. & B. R. R. Co., 22
; *Smith* v. *Mayor, etc.*
, 64 id. 10.)

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Rights of the state resp
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8; 2 Austin on Juris.

1 Angell & A
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Y. 242.)

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'eele, 119 N. Y.
v. *Potter*, 47
175; *People ex*
d. 234; *Peopl*
People, 13 id.
Reed v. *O. R.*
124; *O'Brien*
Ill. 585; *War*
of Racine, 14
Y. 578; *Cro*
§ 9; Cooley on
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15 Barb. 131;
9 N. Y. 335;
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3 Barb. 239; *P*
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; *Slater* v. *Jewe*
Cooley on Const
-178; Elphinst
l. on Ev. 277, 2
Johns. 477; I
Cromwell, 11
462; *Springst*
., 54 id. 226;
91 id. 520; *Ma*
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Statement of case.

2 id. 590; *Child* v. *Starr*,
meir, 7 Wall. 287; *Miles*
. Rice, 13 Me. 198; *Nicke*
incoln v. *Wilder*, 29 id.
end. 423; *Canal Apprais*
H. R. R. R. Co., 6 N. Y.
Roberts v. *Baumgarten*,
Fall River, 147 Mass. 5
. 9; *Rundle* v. *D. & R*
McKeen v. *D. D. C. C*
St. 424; *State* v. *Jersey City*, 25 N. J. L.
v. *Gifford*, Hopk. 416; *Corning* v. *T. I.*
tory, 34 Barb. 485; 39 id. 311; 40 N. Y.
grant of these waters to the city is an appr
public property for a local purpose, within the m
Constitution. (Const. art. 3, § 19.) The Skaneat
and feeder form a part of the Erie canal system,
inalienable by the legislature. (Const. art. 7, §
v. *Cary*, 66 How. Pr. 365; *Robinson* v. *W. P.*
Penn. St. 319; *Willink* v. *M. C. & B. Co.*, 4 N
S. N. Co. v. *Comrs., etc.*, 11 Penn. St. 202; *Le*
Co. v. *Northampton County*, 8 W. & S. 334; *P.*
v. *Frailey*, 13 S. & R. 422; *R. T. Co.* v. *Stoeve*
378; *N. Y. & E. R. R. Co.* v. *Sabin*, 26 Pe
State v. *U. C. R. R. Co.*, 18 Ind. 194; *Parish*
22 N. Y. 494; *Hoyle* v. *P. & M. R. R. Co.*,
Nostrand v. *Knight*, 123 N. Y. 614; *Nye* v.
id. 195; *Simmons* v. *Cloonan*, 81 id. 557; I
Osborn, 62 Barb. 338; *Warwick* v. *Mayor, etc*
Wetmore v. *White*, 2 Caine's Cases, 87; *Spear*
14 Wend. 21, 25; *Bruce* v. *D. & H. C. C*
371; *Selden* v. *D. & H. C. Co.*, 24 id. 362; 2
In re S. I. R. T. Co., 103 id. 256.) The la
void, because it requires expenditure withou
returns. (*Weaver* v. *Cherry*, 8 Ohio St. 562
Mun. Corp. § 72.)

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should acquire or extinguish all water p
ıe outlet to be affected by the proposed sto
subject to these restrictions, general power
oard to perform all acts and acquire all prop
roper to enable the city to store and obtain w

It appears from the findings that Skanea
of water distant about seventeen miles f
length is about fifteen miles, and its ger
ıe mile, with a surface area of about thir
nd a watershed, including the surface, of seve
th square miles. It is about four hundred
above the Jordan level of the Erie canal,
water through an outlet, known as Skane
n miles long, into the Seneca river, thence
ver and into lake Ontario. The lake has l
s navigated by steamboats and other craft,
igable communication between it and any o

ersy between the parties requires this cour
validity of an act of the legislature. The
g such an inquiry were well stated by RUGER,
ple ex rel. v. *Angle* (109 N. Y. 567): "Wi
requires a case to be made showing clearly
.en fairly and reasonably construed, is brou
ith some provision of the Constitution be
be justified in pronouncing it an unauthor
the legislative will. If the act and the Co
o construed as to enable both to stand, and
legitimate office to perform, it is the dut
ve them such construction; but if this ca
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provision and the nullity of the statute. W
otion is in favor of the constitutionality of
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se of gates in the dam, which, since the been under the control and management ne state. About nine miles below, at the nother dam has been constructed across the

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Pixley v. *Clark*, 35 id.
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t, therefore, which t
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section of the Constitution, refers to a transfer of erty as a gift or gratuity, and not to some right in connected with property belonging to the state for an equivalent. By the provision of the statute is to be enlarged and its storage capacity greatly d forever maintained at the expense of the city. ment contemplated by the statute is one which, in nt of the legislature, would be mutually and antageous to the city and to the state, and such a within the reason or purpose of the constitutional ferred to. We think that the statute is not in con- y provision of the fundamental law, and is valid. ment of the General Term should be reversed and Special Term affirmed, with costs.

r, except RUGER, Ch. J., not voting, ANDREWS, g, and FINCH, J., absent.

on reargument:

Prior to 1889, the attention of the inhabitants of Syracuse appears to have been strongly directed to f a water supply for that city, and to that end the 291 of the laws of that year was passed. The act r the appointment of water commissioners to be e Syracuse water board. By section 3 of the act, vas authorized for and in the name of the city to nstruct, maintain, control and operate a system rks to furnish the city and its inhabitants with Skaneateles lake. Section 18 of the act was as

acuse water board, by and with the consent of the is hereby authorized and empowered to appro- uch of the waters of Skaneateles lake as may be supply the city of Syracuse and its inhabitants upon the express condition, however, that the city shall, when so required by the canal board, furnish ource or sources, and in such manner as the canal lesignate, as much water for the use of the Erie

on of the Court, J

n by the city
by this act sh
r to provide
anal, and to dc
ll be needful t
ters of Skane
· 314 of the La
l as follows:
ter board is he
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of said lake int
ater into said

ing a sufficient quantity for all the uses of the Erie
said superintendent of public works is authorized
red to stop the flow of water into said pipe, in whole
, so far as may be necessary in his judgment to secure
cient quantity; it being understood that the rights of
f Syracuse hereby conferred in and to such surplus
e to be subject always to the superior claims of the
reto. Before any water shall be taken from Skane-
e under the provisions of this act, the city of Syracuse
uire or extinguish all water-power rights upon the out-
l lake to be affected by the proposed storage of water.
of Syracuse shall at all times protect and save harm-
state of New York from and against all claims and
of riparian owners upon said lake and outlet for loss
ge occasioned by any act or structure authorized
The powers granted to the Syracuse water board to
roperty under this act, and to make payment therefor,
eemed to include full power and authority to do and
ll acts and things necessary or proper to enable said
quire, store and obtain water from Skaneateles lake
ance with the provisions of this section."

s constitutional objections to these acts have been
to the courts with much ability and pertinacity. A
ful re-examination of the whole case, after the rear-
which the magnitude of the interests involved and
ons peculiar to the case induced this court to grant,
doubt in our minds that these objections are without
n. We will here pass over all of them but two,
ie others to the dispositions made of them in the
of Justices CHURCHILL, KENNEDY and MERWIN, deliv-
these cases in the Supreme Court, and of Judge
in this court, after the first argument.

vo constitutional objections to which we will here
her consideration are the alleged violation of section
cle 7 of the Constitution, which provides that the
not sell, lease or otherwise dispose of the Erie and
ls, "but they shall remain the property of the state

management fo
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factures and commerce, mitigate the calamities of war, ce the blessings of peace, consolidate the Union, and ce the prosperity and elevate the character of the United ; and *Whereas*, It is the incumbent duty of the people s state to avail themselves of the means which the hty has placed in their hands for the production of such extensive and lasting benefits to the human race."

vas deemed important in order that these beneficient s of the canals should be fully achieved, that they should ll into the hands of private individuals or corporations, ould belong to and be controlled by the state in the st of the people; and to obviate any danger that they be leased or disposed of to private individuals or corpo-s, it was deemed wise to insert in the Constitution of provision that "the legislature shall never sell or dis-f * * * the said navigable communications or any r section thereof, but the same shall be and remain the rty of the state forever." In the Constitution of 1846, ne provision was embodied in section six of article seven, guage above given. Now, what was plainly meant by nguage used in these sections? Manifestly, that the , as highways of commerce, connecting the lakes with tlantic ocean, should forever remain the property of the and under its management; and it meant nothing more ould have meant nothing more. The canal water-ways, e navigation of boats, were not to be sold, or leased, or vise disposed of, under any act of the legislature; nor the legislature authorize the sale of any other property ng owned by the state connected with the canals, and ly essential to their operation and maintenance; and it t be conceived that more was intended. It immediately e the policy of the state, notwithstanding the constitu-provision of 1821, to sell and lease the surplus waters of nals, and that policy was inaugurated by the generation tesmen living when the canals were projected and com-, and when the Constitution of 1821 was framed. The acts upon that subject, and all the acts in reference

thereto, like these now under consider
provisions that sufficient water should
the use of the canals. By the Revise
§ 75), it was provided that "whenever
(canal) board, any water may be spare
or works connected therewith, withou
tion or safety of such canal, and the
first privilege of taking such water sh
thereof, or there shall be no person so
order a sale of such surplus water for
discretion, to the person who shall bid
therefor;" and at page 233, section
"whenever a sale of surplus water sh
by the canal board, the acting canal
whose line such water shall fall, shall
vey such surplus water in the manner
low minute provisions as to the mode
conveyance to be given to the purcha
visions is as follows: "The conveyan
reservation of the right wholly to re
veyed, and the privileges thereby gran
limit the use of such water and priv
opinion of the canal board, or the le
supply of water for the use of any s
of such canal, or works connected the
resumption, control or limitation nece
that where such resumption is made,
imposed, no compensation or damages
improvements or erections made in co
or lease." Under those provisions the
leases of surplus waters of the canals
state; and yet it was never held or cla
tion of the surplus waters was a violati
provision referred to. On the contrar
recognized by the courts as valid and co
Miller, 2 Hill, 418; *Dermott* v. *State*,
v. *Smith*, 5 Paige, 137; *S. C.*, Id. 946

waters of Skaneateles lake, therefore, be regarded as
f the Erie canal, then there is nothing in the act of
d 1890 but the disposition of surplus water not needed
canal, and hence these acts are in harmony with the
f the state pursued ever since the construction of the
stem of the state. If the water of the lake had all,
the outlet thereof, been taken into the canal, the sur-
ter thus created in the canal could have been sold or
nerefrom by the state. Then why may it not sell or
from the lake before it reaches the canal? The state
ays permitted the surplus water of the lake to flow
the outlet for the use of mill owners thereon. Could
ıave permitted such mill owners to take the water
from the lake or the state dam at the foot thereof?
ore the surplus water of the lake not needed for the
as been permitted to run to waste through the outlet
ıe canal on its way to Lake Ontario. Why may not
, instead of that course for it, permit it to run through
e of thirty inches diameter to the city of Syracuse,
be used or wasted?

ıapter 316 of the Laws of 1839, the canal commission-
authorized to permit the surplus water flowing over
he dams on the Oswego river to be used for hydraulic
by the owners of the lands over or upon which such
lowed, under such regulations and restrictions as the
ınmissioners might impose, and subject to be resumed
ime they deemed proper without any compensation to
ners by reason of such resumption. It was never
ed that the legislature was competent to pass that
he disposition of the surplus water flowing over the
But suppose the dam had been so constructed that the
water instead of flowing over the dam had been per-
o flow through gates in the dam which were under the
control of the canal officials, would not the waters not
for the purposes of the state have still been surplus
And could not the legislature have authorized the
disposition of them without violating the constitu-

rovision referred to? The
f 1842, provided for leasin
f the Erie canal at Black Ro
ts of a similar nature.
ose the canal commissioner
iation of land for a gravel p
gravel had been exhausted
the land, could it not be sol
al had been changed and
useless, and possibly a nuisa
use for it, could it not be so
e state? Suppose the state
from misjudgment or some
would the state be bound t
state allow private citizens,
he waters flowing through
ter season? And could it n
them in the winter to use
canal for the purpose of tra
wers to all these questions
e quite absurd to claim that
e or disposition of any porti
Constitution.
erous acts of the legislature
canals show that property
id formerly appropriated an
andoned or otherwise dispos
rs of 1847, the canal commis
e Jordan level of the Erie
ereof as was no longer used o
act authorized the owners o
l formerly passed to enter u
chapter 413 of the Laws of
ed to sell a portion of the a
wners of the adjoining land,
aws of 1849, it was provide
all by resolution so provide

es of the canal may be sold by the commissioners of the fice, the proceeds to be credited to the fund appropri- r the construction of the canal for which such lands ken. By chapter 214 of the Laws of 1850, the canal was authorized to abandon so much of the old canal in age of Geddes as they might deem best for the interest state. By chapter 263 of the Laws of the same year, al board was authorized to abandon the Fort Miller d the use of the side cut at that place connected with amplain canal. By the act, chapter 267 of the Laws of t was provided that whenever the canal board shall, by on, determine that any land taken for the purposes of als of this state have been abandoned, it shall be lawful commissioners of the land office to sell, convey and the title of the state thereto. By the act, chapter 787 Laws of 1872, the city of Binghamton was authorized a portion of the Chenango canal for a public street. act, chapter 369 of the Laws of 1877, the canal board thorized to close the feeder of the Erie canal in Roches- l to convey to the owners of the real estate adjoining der the fee to the land occupied by it.

e present contention of the appellants is well founded, operty once appropriated and used for the canals must remain the property of the state, then these various unconstitutional. But if the legislature could author- sale of useless feeders and abandoned portions of the and the surplus waters of the canals, then it had the to authorize the city of Syracuse to take the surplus of Skaneateles lake not needed for the use of the canals, t violating the constitutional provision referred to. arious acts show the common understanding of the ge used in the constitutional provision prohibiting the the canals, and that it does not apply to the sale of any y or rights of the state appropriated for the canals and time used for the canals, which are not necessary for eration and maintenance as highways of commerce. he completion of the canals to this day the whole course

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and statesmen of our sta
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Statutes (1 R. S. 217, § 1
throw any light upon
that "the navigable comr
now in the progress of
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ation connecting the wat
ıdson river, and all the s
onging to the state conne
e canal." That was a de
ve purposes, and was int
ıal system of the state sh
That provision and th
light whatever on the
stitutional provision refe
fore, clearly of opinion

) cannot be condemned as in violation of section 6 of
of the Constitution. It seems so plain to us that, but
earning and ability of the eminent counsel who have
l on behalf of the plaintiffs, we should not have con-
the point worthy of very serious consideration. We
is far proceeded upon the assumption that the state
ie property rights in the surplus waters of the lake.
se, if it did not have, there would be no ground what-
the present contention on the part of the plaintiffs.
is claimed with equal zeal, and argued with much
and ability, that the acts of 1889 and 1890, are in
with the other section of the Constitution, above
to. It is well to determine, in the first place, what is
y "appropriating" the public moneys or property for
private purposes. It is not every appropriation for
some sense, may be called a local purpose, that comes
his provision. Where the appropriation of money is
s purposes, although its expenditure is confined to a
it does not require a two-thirds vote. So, too, appro-
s may be made, in a certain sense, for a private pur-
d yet not require such a vote. Money may be appro-
priated to pay individuals for property purchased for the state or for salaries or wages without requiring a two-thirds vote, and thus the appropriation and supply bills annually passed by the legislature, unless they contain donations of public moneys or property for local or private purposes, have never been understood to require such a vote. The word "appropriating" as used in the constitutional provision manifestly has no reference to the appropriation of public money or property where the state gets an equivalent. While such an appropriation may be private as to an individual, so far as it is for the benefit of the state it is for a public purpose. While money appropriated for the improvement of Skaneateles lake for the benefit of the persons living near it or going there for fishing or navigation might be for a local purpose, yet if the improvement was for the benefit of the Erie canal, a highway of commerce through the state, the

appropriation would not be for a lo
general welfare of the people of the
more for a local purpose than the mon
construction of the capitol, of arsenals
a locality intended for the benefit of
state. Except as prohibited in the sec
ering, a majority of all the members e
can appropriate money for any purpo
not otherwise in conflict with any
and while this is so, why was this pro
9 limiting the power of the legislatu
thirds vote? This large vote was nec
money or property of the state wh
interested, and from which the peopl
were to derive no benefit and in whi
Such bills, of no general importance, wl
give away the property of the stat
required to be passed by a two-thirds
property cannot, without such a vote,
purposes, in which the state has no in
purpose of this provision were clearly
legislature, without a two-thirds vo
appropriations of the public money or
individuals, and thus to divest the stat
erty without any equivalent, and it
pose. The legislature by a majority
sale of the property of the state fo
disposition of it in discharge of an obl

Now, what does the section of the t
ation do? Does it, in any proper sen
property of the state? The right give
to draw water from the lake is, as we
largest extent, a mere license to be e
stant supervision of the state, and su
right and control. It can never, at
before said, take water which the stat
only the surplus water which would

ms to us an unwarrantable use of terms to hold that such
nse is an appropriation of the property of the state. But
s not all. This is not a gratuitous appropriation. The
s to increase the storage capacity of the lake, and erect
naintain at its own expense a dam and the structures con-
d therewith. There are two parties to the bargain, each
ich gets some advantage. The state gets a larger reser-
rom which to supply the needs of the Erie canal, and has
am kept in repair free of expense to it. After the so-called
or license to the city of Syracuse the state has still the
right and control over the water for every purpose needed
t ever had; and it is impossible to perceive how, under
circumstances, it can be said that the act of 1890 appro-
s money or property of the state for a local purpose,
n any fair meaning of the terms used in the Constitution.
of the acts above referred to, disposing of surplus waters
canals, were passed by a two-third vote. In *Rumsey*
w York & N. E. R. Co., recently decided in the second
on, an act of the legislature there under construction,
rized the gratuitous grant of the land of the state for
l purpose, and it was held that it required a two-thirds

t it is further claimed that section 18 of the act of 1889
nconstitutional, and as it was a necessary part of the
scheme of that act, that, therefore, the whole act of
was unconstitutional and void, and was not given life and
red valid by the subsequent amendment of section 18.
thout determining whether section 18, as contained in
t of 1889, was valid or not, we do not think that even if
e invalid the whole act was rendered thereby null and
A water board was thereby constituted and clothed
ome powers which could be exercised, and after section
s amended, and thus rendered valid, nothing stood in
ay of the full operation of all the provisions of the act.
re not, however, prepared to say that if the whole act
ndered invalid in consequence of the invalidity of sec-
8 it would follow that the act remained invalid after the

constitutional pro
assed, as we may as
the act. As to al
to its amendment,
ction as amended h
d it was an act of
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Those matters ha
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ithout deeming it
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ould further be sai
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construction often
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tify its condemnat
in *Ogden* v. *Saund*
respect due to the
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in favor of its valic
proved beyond all
the General Term
the Special Term

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H. DYETT, as Assignee, Respondent, *v.* SAMUEL P. HYMAN et al., Appellants.

129 351
160 510

on of a bond to a sheriff indemnifying him against damages from an unlawful levy and sale of property made by him, vely establishes the liability of the obligors as principals for al trespass committed by the sheriff.

connected with the original wrong are jointly and severally the sheriff, and it is no defense, in an action by the owner of rty against one or more of the wrong-doers, to show that e not joined as defendants who are also liable.

ns of the Code of Civil Procedure (§§ 1421–1423), giving the rs the right to be substituted in such an action as defendants f the sheriff, do not have the effect to limit the liability of nitors to the amount they would be liable, in an action by the on their bond, and in no way affect or vary the rights of the rty; their liability to him rests wholly upon their participa- original trespass.

are jointly and severally liable for an unlawful taking of annot, by any arrangement between themselves, prejudice the the owner.

ction against a wrong-doer is a right of property, and can be a the owner only by process of law.

tion is brought against several alleged joint wrong-doers, the nay at any time, by leave of the court, discontinue the action or more of the defendants.

brought by an assignee for the benefit of creditors, to recover for the unlawful taking and conversion of certain of the ersonal property, it appeared that the property was taken by y virtue of certain attachments against K., the assignor, among ssued in actions brought by defendants H. and M. Defend- led the taking on the ground that the assignment was fraudu- oid. Plaintiff offered in evidence a judgment-roll in an action y H. and M. against plaintiff and K. to set aside the assign- e ground of fraud, which was decided in favor of the defend- n; the court adjudging the assignment to be valid. This was s against H. and M. alone, under objection and exception. rror; and that the judgment was conclusive as to the validity gnment as against the plaintiffs in that action; that the fact s necessary for them to show a judgment in their favor and of an execution unsatisfied did not affect the character of the r did the fact that plaintiff, for the purpose of connecting said s with the unlawful taking, introduced in evidence a bond ty executed by them to the sheriff; that in both actions they

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but that the plaintiff made out
against the defendants Hyman
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tively established by their app
manifested by the execution o
The sale of the property was
defendants were thereby show
authority over the action of tl

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ould furnish a c
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horize the court
e and compel hi
ause of action,
rize the taking
he Constitution
ion of parties th
an equivalent remedy for the wrong don
responsible parties, that the legislation in
justification. (*Hayes* v. *Davidson*, 98 N

The theory presented by the appellant
defendants are liable as indemnitors only
the provisions of their bond, is wholly
bility of the defendants rests wholly up
in the original wrong and their liability
incurred by reason of their complicity in
it is true, is evidenced by the bond
authorized the sheriff to consummate the
unlawful sale and conversion of the pl
in no sense is the action upon the bo
fore, of the opinion that the plaintiff ma
of action against the defendants, and that
no error in directing a verdict for the pl

The defendants, however, made som
admission of evidence against them, and
introduction of the judgment-roll in the
Morris against Kapp and Dyatt, and too
ruling of the court thereon, and now urg

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sons offending against such ordina
any magistrate of the city by fine
vided further that a special electio
for the purpose of determining
bonds and acquire the park, as pr

It seems to me too clear for di
visions, that the park commissione
government. They hold their offic
government and, therefore, under
their duties relate to its interests
actually set in motion by a vote o
They are certainly not state office
officers, what are they? I believe
the park commissioners of the cit
city of Brooklyn, are city officers
held as to the park commissioners
gott v. *Mayor, etc.* (96 N. Y. 274
contend that a New York or B
would be eligible, under the Con
There could be no reason for ho

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ention is manifest
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ffice" shall be el
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holding, as well
ffice. (*Curson* v.
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ectors, and they vi
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rtant question un
mandamus to con
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Can the relator
is violation of the
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nerely at the duty
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questions to be

. party can demand a mandai
a clear legal right, never
gh's Extraordinary Legal R
he writ of mandamus is neve
ıpelling the performance of
carrying out an unlawful proc
is a fundamental principle of
writ will never be granted
ıld prove unavailing;" and in
t a person seeking the aid of
ıt of his rights, should come i
o not attribute to the relator
ent in anything he has heretof
racterize his acts as they are n
. the laws.

n *Peters* v. *Board of State C*
held that a mandamus woulc
rd of state canvassers to comp
issue to the relator a certific
n elected a judge at a time wh
held. (See also *Rose* v. *Co*
; *Sherburne* v. *Horn*, 45 Mi
hittemore, 11 Neb. 175.)

n *State ex rel. Ensworth* v. *A*
judge was held which was nc
voters as required by law, and
invalid, and that the court wc
County Court to issue a comm
e elected, although the functi
ely ministerial. The court sai
eremptory writ of mandamus
has a good title or a perfect rig
can derive no right from an i

n *State* v. *Mitchell* (23 Kansa
ction held in the county of Ha
the location of the county s
ıvassing board showed a vote

out 800 legal voters in the county.
r a mandamus to compel the board
declare the result, and it was hel
fact that the duties of the boa
and that it was not charged w
to the reception of illegal or the r
udulent practices at the election, t
ise of a sound discretion, not even
, an outrage on the purity of th
ndamus to compel, in the name
with duty, the canvass of the ret
es.

ex rel. Snyder v. *Newman* (91 Mo.
late for mayor of Pierce City at th
l the respondents were the alderm
e of the city made it the duty of t
day after each election to canva
ho had been elected to the vario
erk to issue certificates of election
cted. In that case the aldermen
had received the highest numbe
direct the clerk to issue a certific
sought by the writ of mandamus
he law declared that no person s
the fourth class unless he was an i
year next before the election. Or
d that the relator did not possess t
rt said: "A peremptory writ of
l unless the relator shows a clear rig
ks. The election of a person to a
the requisite qualifications, gives
ffice. As, by reason of his disq
not entitled to hold the office, s
hand of the court, to be armed
—evidence of title to that to w
ld the writ of mandamus was deni
s of election are mere ministerial

uly elected and qualified to sit th
that one was ineligible, and that
d that thus there is a vacancy in
new election. It is undoubtedly
by *quo warranto* try the title to a
s not such a case. Here the rel
its aid to clothe him with apparen
ffirmative action, to remove obsta
ay in his proposed intrusion into
lisputed facts, the court is able t
d it simply determines that it wi
ng such determination, it in no wa
on confided to the senate. It sir
which he has invoked.

substantially the same question
the 27th senatorial district had
e instead of Sherwood. The sa
have used would answer his appl

treated as in any sense a proc
ple. Nor can it by amendment
eding. A writ of mandamus or
ir sovereign capacity can be aw
on of the attorney-general, or so
indorsement upon the writ must
such application. (Code, § 1993.
me of no person need appear as
Here the writ was awarded upon
od, a private person, and he
1994.) In such a case the pro
orce a civil remedy and the peop
rmal party and their presence is
. which has long since ceased to
ility. The real party in inter
case, and if he should die the
gh's Extraordinary Legal Remed
l not, therefore, now determine

d do if the mandamus in this pro
ıpon the application of the peo
ıorized to represent them.
e that the board of state canvas
ıat they have no power or jurisdic
urns of the county canvassers o
to the eligibility of the candidate
e electors. The question of eli
by reference to the law as well
y, as I think, they are not clothed
that question. Much less have
whether the minority candidate
ɔn of that question is involved
he majority candidate, but the
ıe voters voted for him knowing
› rules laid down in *People ex re*

ɔf the officers clothed with the
ve any power in a case like this
of candidates and to disregard
candidate from the following pr
Ballot Law of 1890: "Wheneve
whose name is printed on the
shall be or become ineligible, c
ore election day, voters may use u
ill the office for which such dece
ı candidate was nominated, and
neligible or withdrawn candidate s
been erased from the official ballot
shall contain only the name of
ı of the deceased, ineligible or witl
the designation of the office for
lidate." That provision was in
ers, in the cases mentioned, to vote
only in case some candidate is
ɔallot that the name of the candid
ɔ be considered as having been er

fficial ballots, and no candidates were voted for whose names were upon the official ballots.

the board of state canvassers obtain power to make the elegibility of the relator by virtue of the fol- ision in section 843 of the Code: "Where an n, board or committee to whom or to which appli- de to do an act in an official capacity, requires or proof to enable him or it to decide upon the doing the act, he or it may receive an affidavit for ." As the state canvassers have no jurisdiction to o the eligibility of the relator, they can have no perform in reference thereto, and they can require ion or proof to enable them to enter upon that they are confined, as we hold they are, to canvass- ns and in the discharge of that duty to what law- s in or upon the returns, then they can have no of which will enable them to go back of or outside us. I can imagine cases in which this provision application to the state board of canvassers, one of ere it is claimed that the returns are spurious, or ave been altered, and in that case they might take davit to inform themselves as to the facts.

erefore, the state canvassers were bound to canvass from the 27th senatorial district and to declare the npliance with the law, yet for reasons which we the court will not aid the relator. The action or f the canvassers may be an obstacle in his way, t will not by mandamus in a case like this, where owing his ineligibility are undisputed, assist him in e obstacle. He and his competitor may both pre- ses to the senate without either of them having a election, and that body will have jurisdiction to l the questions of fact and law involved in the it shall agree with this court that the relator was d also find that his competitor was not elected, the e that a new election will have to be ordered in and the electors there can then choose a person

d the office, and then th
ıe senate. It is far better
ote again than that the Cc
afety of our government
institutions depend upoı
l observance of the laws.
ındation upon which the p
it would be quite unfortuı
nay make, to encourage la
ue that a majority of the
t have, through the ballot
ıtor should represent them
that that will should for the
system of government,
ajorities must express the
by the Constitution and tl
n of a senator should
laws should be nullifie
(14 Ind. 93), it was w
ı our form of government,
the course indicated is not
ıay be disfranchised, the
ı trampled under foot, ı
d to. True, by the Cons
ice of a majority controls
t be constitutionally anc
should not nullify a prov
itted, at will, to disregard
l beauty of our instituti
that where one of the cand
own to the electors, or the
l to know it, votes cast foı
uld have to be disregarde
rity of the legal votes dec
n, therefore, is that the or
ns should be reversed, anc
ıied.

Dissenting opinion, per FINCH,

. (dissenting). I agree entirely
ssers have only ministerial and nc
ole duty is to make certain comp
the county canvassers, returned
cording to law, and having mad
y the proper certificates; that i
y they are not at liberty to consid
papers or information beyond th
hemselves, considered and treate
question beyond the result of t
e their attention or solution. T
it, we are all agreed, and there
f opinion. And so we may rega
lly and definitely settled, in ac
current of authority, and the usa
d without a break. It secures
lid ground upon which we can all
d and without any distressing div
pply that doctrine in the case
result is that the state board are
n his district, to ascertain who
such votes, and to give to tha
f the fact ascertained. That is al
time asked. Our decision entitle
h his mandamus be quashed; f
at the state canvassers will viola
e as expounded to them by its c
y themselves, in and by the ter
which all these cases have
nd agreed to act in accordance wi
rt. We have interpreted the la
ed that whether Sherwood was
with which they have no concern
t consider, and which, however
e or effect upon the one distinct
have to perform. They are mer
and it is not to be imagined tha

ce of a mandamus is necessa
as that duty has been define
elves have formally promised
stion, therefore, whether the
r quashed is, in and of itself
ediate result to the relator w
iscussion might end here.
: but the technical questio
on of the writ has been usec
uestion of Sherwood's eligi
for a judicial expression o
it just or useful purpose ma
unable to discover. Whateve
annot alter or affect the p
state canvassers must perform.
egitimate effect upon the ulti
on by the senate. As to the
an interference with their d
ir independent action. That
ur judgment as an invasion
ntable trespass upon a co-or
t, and it would not be strang
gnation, and while not rudely
ction, should find some polite

I am afraid we should de
ns, which I shall seek to deve
hat the question of Sherwoo
e relief asked; that it furn
inst the writ; and that we h
the question in any event.
nd upon which the majority
elator, on an application fo
r legal right to the relief v
to establish such right must s
he office of senator; that he c
cause he was ineligible; an
been issued. Now, is it a s

g to say that a man must show that he
office before he can require the state ca
votes so as to know whether he *was* el
mes to this court and demands its aid to
oper authority if he *was* elected, and t
o right to have the votes counted unless
ecise fact which he seeks to ascertain.
a candidate telling his experience afte
nplaining with a somewhat dazed expres
he court to compel a count of the votes
im that he could not have it because he
hen he went to the senate for his seat,
that body told him he *was* eligible but c
because the votes had not been counted.
lt shows us where the probable fallac
ied on may be found. It lies in the sub
actually asked and sought of another an
t asked and not sought; in treating what
f a process as the exact equivalent of the
t process; and in a declared inability t
nder its clothing of ambiguous phrases
to his office is one thing; his right to k
were cast in his favor and who received t
ner. He has not asked this court to adju
to decide that he was duly elected to i
t called upon to show that he *is* entitled
cted to it. The relief he *does* ask is that
ast in his district shall be counted and th
ified. He shows a clear legal right to th
awards it, and, as we have held this
that relief at the hands of the canvassers
or not. To obtain that it is enough for
ere has been an election, that votes were
didate, that a statement of them has been
vassers, and they refuse to count them for
reason and does not excuse. That makes
is clear legal right to the relief which he

h is only one step or stage in a
ıate result, and one which de
but upon very many others.
think it possible to uncover wh
ailing opinion in another way.
)een a very close election, so cl
how two or three ballots are
assers refuse to count. One of
wood did, for a mandamus to
ıat duty. This court says to hi
ınt until you satisfy us that you
)ffice which we see you are tryi
ş be more unreasonable or absu
demonstrate that the candida
t need not show that he wa
le him to the precise measure
ısked in this case? It is of no
r has or has not been duly el
ication is concerned; and the i
ıolly immaterial, and only mad
ting for one step in a proces
t. If it be objected to my illu
h it was possible that the relat
ed, while here there was no suc
)bjection begs the question. It
duly elected. Neither this co
the judgment of the senate. W
ı when we assume to act as pro
nal, and to handicap the rights

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was precisely such a state of af
ibed which this court had in vi
anal Appraisers (73 N. Y.
ıen the act, the doing of which
ıandamus, is the final thing and
ıat he seeks proximately or ult
her he is entitled to have that

· or person to whom
considered by the
andamus; but wher
the final result, and
unal which is to dec
d, then the inferior
her there exists the
whether the relator
is sought from him
inal and ultimate re
onstitutional tribunal
led to hold the office,
plurality of votes, bu
e, not asking that fu
essary as a prelimins
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prove what he was n
e relief which he de
ion was immaterial.
sue is not merely im
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ecline to express any
rwood was or was no
ear, and yet, for the
him to be ineligibl
here is no defense to
. be affirmed. The
nted is that it destro
it does. But has it
They are the real
ant. He is not the
en, as one of the peo
r. They are the plai
bar, to this court whi

it in hand, but with a gravity we had
id demands of us that we command fiv
ld a public office upon a public trust, t
duty in respect to a matter of vital in
nd purity of our institutions, which
orm in a lawful way; and we answer t
; the people in motion claimed to hav
is own, and since we are satisfied that
. our duty to tear up the people's wi
out of court, and leave unfaithful s
olic law with impunity. In substance
we think you are right and the canv
cannot approve of your relator, and i
e quash your writ and turn you out of
been in the habit of treating the peop
justice. Even in actions of *quo war*
on the relation of a claimant to an off
remove a usurper holding it without
decided that the relator had no title ar
it was yet ruled that the court shoul
ut proceed to judgment of ouster aga
s *ex rel. Judson* v. *Thacher*, 55 N
le is well described by Judge FOLGER
v. *Hall* (80 N. Y. 117), where he s
s language and his authorities: "Besid
geton's case, all the judges were of
n of a question raised between her
ot be conclusive between her and the C
355; *Barrs* v. *Jackson*, 1 Phillips,
are not barred by it. They may still
ne defendant claims the office. The p
ex rel. v. *Thatcher* (*supra*) applies he
may proceed and inquire where like n
a private person will not be entertain
nts. See *King* v. *Clarke* (1 East. 3
ited and quoted from in the argume
endant. And there may be judgmen

ainst the defendant of oust
in favor of the relator tha
Phillips, 1 Denio, 388; see
6.)" In the foregoing
ablished that the defeat of
e, and the court must still
he latter. The authority i
e contrary so far as I ha
be obeyed. If it is, the
d, for, however Sherwood's
rded, his right as a citizen
ople must be sustained. A
ether the state canvassers l
the returns; and a few w

mplication began with th
nvassers of the county of
ented by Charles E. Wal
sed to Sherwood, and de
of about fifteen hundre
ny certificate to the latte
ng that, at the date of the
rk commissioner of the H
The county canvassers, on
ing a correct and truthfi
ast, passed a series of
believed Sherwood to b
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pon the fact; but that
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proofs to the state board
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The moving papers show
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COOLEY said, a
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ong we shall lea
l law of the stat
e case was quite
n application t
n legal questions

lature made such application. They
jurisdiction. The court had authority t
the request and to give an answer. Bu
whether certain senators had been lawf
governor and council and properly adm
ever there was an "invocation," in the
jurisdiction, to go beyond it, and usurp
tribunal on the road to an answer, it wi
resisted the temptation and refused to
that they were not at liberty so to do, a
cedent of interference by one departm
of its duties by another should be estab
judicial decision a dangerous blow wou
struck at one of the most vital prine
government."

Undoubtedly there is enough astuten
that these were cases where the legisl
what of that? If, on the road to a lawf
may be transcended at all, it may as we
ful review as by an unlawful opinion
found no cases to the contrary of thos
of the deputy attorney-general, ranging
Union, has found none except those wh
tion; since in every one cited by him,
existing law authorizing the court to ac
title, or the election itself was a nullity
here, a constitutional prohibition aga
jurisdiction.

And so I deny the asserted doctrine
"right to do evil that good may come;
usurpation; and if the doctrine has any
and destructive hold upon our law, wh

ly shaken off.
ss of jurisdictio
on nor necessity
may be permit
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h EARL, J., ex
ANDREWS, J., co
d.

Statement of case.

ıe Application of the
N D. SHERWOOD for a
ICE, as Secretary of S

o public officers will on
duty.
anvassers, in connection
sent to the secretary of
to the effect that a cand
ırns showed had receive
at office, was not eligibl
which were also sent with
e an order was granted
equiring said secretary t
vassers or the county cle
g him from permitting
nvassers for their consid
d had no right to consi
ecretary of state to retu
y in placing them befo
harm, it could accompl
nied.

1, 1891; decided Decemb

der of the General T
d judicial departmer
ed an order of Speci
nptory mandamus, w

anklin D. Sherwood,
senator in the twe
nual election of 189
county, which is
y of state in connec
t is, a protest in writi
sing candidate for
avits, certificates anc
of Sherwood's eligil
state board of can

panied by a
oard :
, *First*, that i
test of Charle
ther proofs file
of the votes re
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tion held Nov
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vithin one hun
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the provisions
tate ; and that
od was an offi
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That while t
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and 9 of arti
42, to the mak
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county for th
tes and the nu
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that this boar
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make the sam
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of, to the stat
nd for such ac
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the chairman of this board
nvassers a duplicate of these
uch protest, certificates, affid

tained an order requiring the
convene, rescind and revoke
obeyed.

murd and *Delos McCurdy* f

erland, *Joseph H. Choate*,
st and *Eugene Burlingame*
ly issued against the secreta
to deliver up the Sherw
Treasurer, 24 Mich. 468; *Pe*
36 Hun, 488.)

this case the following order
nade at a Special Term of th
he General Term:

that a writ of peremptory
er the seal of this court re
secretary of state, forthwith
ers of the county of Steuben,
unty of Steuben, the copy
ard November 10, 1891, and
s transmitted to said secretary
t, affidavits, certificates and
on file or in the possession of
y of state, or to cancel the
ne said Frank Rice, as secre
in from permitting the said
as sent to said secretary by
nvassers of Steuben county,
board of canvassers for the
; before the said board any pa

Statement o

rel. JOHN H. N
NTY CANVASSI

ured to the citizen
and subject to the
by the legislature
efore, prescribes t
ts must be compl
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st without observi
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of the "Ballot F
hap. 296, Laws of
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l counted which c
ht to be kept sec
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rsement. (ANDR

d act (§ 29) prohi
ot, except the unof
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rovision of said ac
such ballot ref
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M, JJ., dissenting
ndamus to compe
cast at a general e
r, these facts app
act, caused officia
the county, one fo
ons; all were alil

vith the designation of the polli
the ballots were prepared In t
clerk, while those of all the part
candidate for senator, were prop
listricts the ballots of that party w
for one district were sent to anot
id thus the ballots for that party i
with the number or designation
guished from those of the other
id PECKHAM, JJ., dissenting), that
or was proper; that the defective
nofficial ballots, as they purported
authorizing the use of unofficia
ballots could not lawfully be cou

December 11, 1891; decided Dec

L from order of the General
the third judicial departm
ich affirmed an order of Spe

tory writ of mandamus issu
s of Onondaga county to rec
t in said county for state sen
nputation the votes cast for
properly indorsed.
cts, so far as material, are sta

m Nottingham for appella
Laws of 1880, permitting t
o be reconvened under th
id compelled to correct error
and canvass, was not intend
oard as to the matters here in
evidence or consider pro
ex rel. Deuchler v. *Board*
, *People ex rel. Gregg* v. *B*
7.) The duty of the board o
ate from the face of the ret
the number of votes cast f
senator and to certify and

Statement of case.

(Election Code,
N. Y. 67; *Kortz* v.
, 89, 91; *Felt's Case*
chler v. *Board of Ca*
ng Cases on Election
Kan. 102, 108; *I*
ers, 126 N. Y. 39
119 id. 175; *Broon*
Wilson, 38 N. W. R
cannot be impugned
ple ex rel. Noyes v.
ws of 1842, chap. 13
le ex rel. Russel v.
eople ex rel. Gaige
l. Gregg v. *Board*
f county canvassers
he returns to overrul
N. Y. 45.) The or
nted under the Ball
f 1891.) The vote
whom they were l
58; *Monroe* v. (
el. v. *Bell*, 119
Dec. 645.) The i
ith the law. (Laws
91, chap. 296, § 6.)
llots. (Laws of 189
71; Laws of 1891,
27 N. Y. 45.) A pe
in any view of this
tupp, 49 Hun, 544;
Y. 600; *People ex*
477; *People ex rel.*
. 235.) The office
d the legislature bei
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s, these votes can be

hat tribunal. (Co
117; McCrary o
proceedings bef
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here involved wer
v. *Naylor*, 106
l.)

H. Choate, Willia
khurst, Eugene Bu
me general points
e ex rel. Sherwoo
60).

Marshall, O. N. I
ts. The Republic
cts in question, wl
y section 17 of ch
y section 6 of ch
and could not, th
r the candidates
2, Laws of 1890, §§
kson v. *Lewis*, 17 J
N. Y. 78; *Com*
v. *Ross*, 53 Mo.
e Directors of M
onst. Lim. 602;
Sigman, 58 Miss.
kins v. *Caraway*,
56; *State* v. *McK*
37 Cal. 495; *Tale*
478; *Fields* v. *Os*
rks, Id. 962; cha
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3, 1891," follo
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various sets of ballots
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eclared in its title,
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is perfectly plain a
ne numbering of th
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ots which were p
porters of other
marked, or could
argument that tl
prepared for the
and that a misdel
ne correctness of tl
er quite unsound.
he statute calls for
ch designates the
sed, and where tha
ns of the statute m

n my judgment, unles
ffect intended for it, a
provisions, then techn
f minds, can impair it
e court to strain afte
apparent hardship; wh
ting a provision of the l
l to exclude all attempt
the polls. It will not d
f this law framed agai
doing the way be left

The people are supre
izen voter against the
casting of a venal ballo
m, devised by the legisl
t, seems a total failure,
nacted to sustain it. Ge
e chosen to have it, in t
purity of the ballot, an
of a uniform or secret
uards erected and inten
or his protection agains
, we at once do an act
ought to be prevented.
lot, to originate from a
e vote of him who casts
herefore, absolutely secr
case of a mistake, as h
truction; for the proof
tion and distribution
e is, very obviously, diffi
urden of that proof, in
ndidate whom it has ser
e the people generally,
. the terms of the electi
ng to its requirements.
an indirect manner, th

opinion,

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as, enforce the secrecy of the ball
nting and distribution of ballots at
To these ends official ballots are to
cer with whom the names of all pa
to be filed, and this officer is to se
ots. For the purpose of identifyi
y are to be printed in a uniform w
paper and on the back of each
scribed type the words "Official b
word "for" shall follow the d
ce for which the ballot is prepared
a *fac simile* of the signature
re is to be no caption or indorseme
n as above. These official ballots
county clerk to the town and city
day of election to the various e
city. If they are not furnished, t
he act unofficial ballots may be us
furnished they alone can be used
be deposited in the box or counte
t seems to me plain that official ba
ious election districts in question
cease to be such official ballots
cribed. The argument for the r
ots were "not properly indorsed,"
eived or counted within section 29.
ny judgment, embrace such a case.
' indorsed" when printed, for it h
rds and figures provided for by sta
he public expense by the proper p
ection; it had on the back of the t
nature of the county clerk, and it h
ution according to the provisions of
ught to the polls by or under the di
pectively. Hence, when they were
e the characteristics of the official
ots. The statute means that when

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Statement of case.

› do. It should be left for judicial in‹
motives may be dealt with.
his statute with all the care and attent
on it with a desire to construe it in the
purposes and with an earnest wish to
out, but I am utterly unable to see hov
.he construction put upon it by a major
On the contrary, it seems plain to m‹
are endangered if not frustrated by a
n my judgment is unreasonable and un
.ich thousands of perfectly innocent el‹
disfranchised without fault on their part
ıajority be thus set at naught.
ons I am compelled to dissent from the
r the court in this case.
, EARL, GRAY and O'BRIEN, JJ., concı
CH and PECKHAM, JJ., dissent.
d.

of the Application of the PEOPLE ex
DALEY et al., Respondents, for a Mand‹
ɛ, as Secretary of State, et al., Appellant

'oke the aid of the courts to compel the perfor
of a public duty, and so an elector may, at least
of the candidate interested, make application
r a mandamus to compel the state board of canvas
ard a paper purporting to be a return of a bo
hich is not properly signed and certified, and do
a proper legal canvass, and to consider only a]

y clerk, when acting under the authority of the s
. 5, chap. 130, Laws of 1842), as secretary of the
ers is purely ministerial; he has no authority to
ıe action of that body, and may not refuse to ‹
est by his signature, a statement made by the
an election, because, in his opinion, it doe
:gal result. If the statement, as made, correctl

Statement of case.

action of the board, it is his duty to certify
to the question as to whether the board ha
y or not.
ounty clerk refuses to perform his duty in
not confined to the procuring of a mandam
but the board has power to designate one
pro tem., to make the certificate and attest
orrectness of the statement, to file it in t
to prepare and send certified copies ther
rs, in case of the refusal of the county clerk
application for a writ of mandamus requir
ers to disregard the return made by a boar
e moving papers alleged, in substance, that
anvassed the result of the returns made to it
and made up its canvass in opposition to sai
lurality to one candidate when the returns
candidate was elected, and then made a re
per and valid on its face, but which gave t
vass, and these allegations were not denied
ld, that the court below, in its proper branch
command the state canvassers to canvass
n; also, that in case another return, proper
the result of a legal canvass was subsequen
l could canvass it.

ecember 11, 1891, decided December 29, 18

from order of the General Term o
the third judicial department, mad
h affirmed an order of Special Term,
following is a copy:
ordered that a writ of peremptory n
d under the seal of this court, co
the said state board of canvassers t
of election to the office of senator i
district of this state, disregarding the
rd of county canvassers of the county
gned by John Mylod, as secretary of
s not signed by the county clerk of D
l under the seal of said county clerk, b
ney consider only such return from
as may hereafter be filed containing

85.) Mandamus should not be granted when no right to the relief, which it is his ultimat (*People* v. *Tremaine*, 29 Barb. 96; *People* v 89; *People* v. *Supervisors*, 12 id. 217.) The of the board of county canvassers of Dutc certified by the board, attested by the chair and by its secretary *pro tem.*, are sufficient votes cast in Dutchess county; and such st lawfully acted upon by the state board in declaring what person was duly elected senat district. (Code, § 933; Chap. 130, Laws of § 6; *Mayor* v. *Sanch*, 105 N. Y. 210; *Peo* 316; *Stief* v. *Hart*, 1 id. 20; 1 Kent's Con *Foliamle's Case*, 5 Coke, 116; *Weed* v. 2 422; *People* v. *Supervisors*, 13 Abb. [N. (

J. Rider Cady for respondents. The right to maintain this proceeding. (*People Daley*, 37 Hun, 461; *People ex rel. Wellin* N. Y. S. R. 930; *People ex rel. Waller* v. *E* 56 N. Y. 249; *People ex rel. Wright* v. *Co* Abb. [N. C.] 96; *People ex rel. Hall* v. *S* 421; *People ex rel. Lawrence* v. *Supervis People ex rel. Garbett* v. *Rochester, etc., R. People ex rel. Robinson* v. *Board of Super* 505; *Matter of Noyes*, 126 N. Y. 400 "Mylod statement" is fatally defective and ized by statute. (R. S. part 1, chap. 6, tit. 18, 19, 20, 31; *People* v. *County Board o* Hun, 390; *People* v. *Cook*, 8 N. Y. 93; *P* Hun, 596; *Felt's Case*, 11 Abb. [N. S.] 203 27 N. Y. 45; *People* v. *Board of Canvas* C.] 77; *Kortz* v. *Board of Canvassers*, I *Board of Canvassers*, Id. 95; Cooley's Con 782; Meachem on Public Officers, 135.) damus is an appropriate remedy. (*People Canvassers*, 46 Hun, 390, 393; Wood on

.5 Ia. 538; 2 Minn. 180; 29 Ill. 4
disclosed by affidavit warranted the
ap. 240, Laws of 1847, § 29; R. S.
t. 3, § 27.) A formal demand was
ondition precedent to the issuing
v. *Valiente*, 42 N. Y. 549; *Readin*
. R. 53; Wood on Mandamus, 93.)

T. *Choate*, *Matthew Hale*, *Wm. A*
khurst and *Eugene Burlingame* fo
he following points and authorities
in the case of the *People ex rel She*
Canvassers (*ante*, page 360). The
as no such certified statement from I
s the law calls for. (Election Cod
290, 291, 292, 297, 298, 299; §§ 3,
25, 26, 31, 32, 33, tit. 5, chap. 130,
Laws of 1847; §§ 31, 34, chap. 262,
hap. 296, Laws of 1891; Penal Cod
v. *People*, 90 N. Y. 498.) There
ore the state board from the count
shall come, pursuant to the comman
canvassers cannot canvas the vote
itchess county. (Election Code,
72, 283, 284, 285, 289, 297, 298;
392.) Mr. Deane the candidate
ave been elected, having died sinc
vas properly moved by private cit
People ex rel. Walter v. *Supervisors*,
Daley, 37 Hun, 461; *Wright* v. *Com*
. C.] 96; *Hall* v. *Supervisors*, 13 id
r, etc., R. Co., 14 Hun, 371.) The
ally defective. (§§ 3, 9, 19, 23, tit
42.)

, J. We are of the opinion that th
terest in the matter before us to mal

1 (Mr. Deane himself being dead), if it
General Term as the proper tribunal.
ich the public has an interest, quite as
individual, and in such event any citiz
oke the aid of the court to compel th
ublic officer of a public duty. It is al
papers in this case that the paper on fi
state's office, purporting to be a certific
.vassers of the county of Dutchess, of
ction for senator in that county, is erron
alid.

Several grounds are alleged in proof
e first is the certificate is not signed or
nty clerk of Dutchess county acting as t
rd of county convassers, nor was it certifi
such county clerk by mail to the govern
te or to the comptroller, any or either of
Hence the relators claim the paper wa
nt, certified to as required by law, and
ve named, and that the board of s
t ground had no authority to canvas
er allegations are made in the papers att
s of the return. In the relators' paper
board of county canvassers threw out v
nted for Mr. Deane for senator by the
1, and that they had also transposed vote
pectors, so that the votes counted by
ane were given to Mr. Osborn, and
. Osborn were given to Mr. Deane, and
proper and illegal acts it was charged tha
plurality for Mr. Osborn from ninety-tv
on the face and as a result of the
pectors of election from all the county, t
ety-four, and such result would elect Mr.
rteen plurality, instead of Mr. Deane.

In regard to the first objection to the cer
secretary of state, I do not think it v

:, acting as secretary to the board of c
:h board he is not a member, assumed
ı the action of that body. His duty i
ıe statement correctly sets forth the a
statement is to be certified as correct
rman and secretary of the board, and s
attached is to be delivered to the
rded in his office. It is wholly immate
ther the board has done its duty in a
board takes that responsibility, and the
test the action which the board has in
it is alleged by the relators that the b
ıght not to have thrown out, and cou
t to count, and hence the county clerk
sal to certify. This is a great mistake
call for the views of the county clerk
ne board, as to the validity or inval
statements which the board actually n
he secretary to attest, and the law cast
obligation nor the responsibility of s
discharged its duty in a manner consi
ne law.

ne question arises as to what course m
se a secretary of the board refuses to
ıe only remedy by mandamus to com
until he does so sign the statement,
lone in the way of completing the ca
re such secretary resides?

ı a word, does the secretary *ex officio* c
has he the power to prevent the furth
ion scheme as provided by law? S
ıty both absent themselves from the m
e board powerless to proceed, or havi
unting the votes and writing out the
stricken with paralysis, which nothin
arance or the signature of one or
als?

I have no doubt as to the answer to be given questions.

The remedy is not confined to mandamus to retary to sign. If his signature be absolutel refusal to sign, and a temporary absence from t process could not be served upon him, woul whole election machinery from that time. Up tion of the relators, such an outcome is by no The secretary assumes a supervision over the board of canvassers, and if in any respect it be illegal or improper, he refuses to attest the st result of such action, and in order to be entire himself from the office, or goes where he cann steps into another state, and the result would h further could be done. I am quite clear nothi results from the wording of the statute prov county clerk shall act as secretary of the boar statements shall be certified as correct and attest man and secretary and a copy thus certified an be delivered to the county clerk to be recorded so far as concerns this part, must be complied v can be under the facts. If the county clerk and if his deputy be also absent, I have no doul of the board to appoint a secretary in their pla the duties which appertain to that office. An tary appear, but refuse to perform his legal du (a mere clerk of the body for which he is appo the body has power to designate one of its ov a proper officer to attest, under its direction, of the statements it has caused to be made. poses of identification that these signatures are object is to secure incontestible evidence that acted upon officially by any public body the paper, or a true copy of the paper, which was the board, and that it truly embodies the resul of such board.

Ordinarily this purpose is accomplished by th

n and of the secretary, *ex officio*, but if the
refuse to certify, the certificate may be m
y appointed by the board, *pro tem.* The un
ds as an abdication of the functions of sec
of which should not be the necessary resort
cess of mandamus to compel the performan
sterial, yet at the same time public and imp
delays incident to legal proceedings might r
ll possible efficiency and thereby cause a fai
ven a summary removal of the incumbent
preceded by service of some kind of notic
him an opportunity to be heard, and if his
unknown the same could not be made.
diate appointment of one of its own body to
ness should be regarded as within the power
he attestation of such a secretary should be re
because the best that could under the circum
In such cases the power to appoint exist
wer of the board to canvass and certify its
tive the statute would have to use explicit lan
power away.
reasoning applies to the subsequent steps.
tary appointed by the board attested the stat
th the chairman, and sent one each to the se
comptroller and the governor. A further
ied by the chairman was delivered to the
by him recorded as commanded by statute.
vas not certified by the secretary *pro tem.*,
d by the chairman and delivered by the se
the county clerk. It was the duty of the la
n to attest and certify to it, and if he did n
the right to demand its record in his office
d or attested by the secretary *pro tem.*
te makes it the duty of the county clerk with
adjournment of the board of county canvas
he nearest post-office, directed to the govern
state and the comptroller, each, one of the c

copies of the statement and certificate of votes prepared It is further made the duty of the secretary of sta in his office the certified statements received by hi county clerk and to obtain from the governor and co every such certified statement. It is the duty of the of state to send for this certified statement if it have forwarded within the time prescribed by statute, county clerk is directed to deliver such statemen messenger on demand. The secretary of state se messenger to the clerk of Dutchess county and de return but it was refused or at any rate not deliver state board is directed by the statute to proceed t statement and canvass the result upon the certified the statements made by the board of county canvasse

Thus the whole scheme of the statute clearly show was enacted so as to secure before the board of state ers the physical presence of accurate copies of th which were in truth acted on by the boards of co vassers, and to this end is directed all the machinery cates and attestations by chairmen, secretaries an clerks, and the forwarding of duplicate certified stat the state officers named in the statute. If these vari ing officers do their duty as provided for by law, their certificates and signatures are the only proper of the verity of the papers they certify to.

The question in this case is whether the refusal of t clerk to sign as secretary of the board of county c and his refusal to send to the state officers properly statements as required by law, shall prevent the st from making any canvass. Upon the refusal of th clerk, the proper statements, attested as stated, were the secretary *pro tem.*, to the state officials. It is sub conceded that this statement in the office of the sec state is one that was certified by the chairman and secr *tem.*, and that it truly embodies the action of the boa vassers, but it is further urged that inasmuch as the co has not sent the return to the secretary of state at *A*

county clerk, no action can be taken upon it, and no canvass can be made. This is as we think, an erroneous view. When these officials refuse to perform their duty, they cannot thereby prevent the further proceeding towards a completion of the canvass. This is a question where time is of the utmost importance, and any delay which might last for thirty days, might have the most disastrous result upon the whole administration of the state government, and might even work a change in the result of a national election. In truth, it might actually paralyze the state government, or it might change the personnel of every State office. The county clerks have by law until the last day of November in which to send their certified statements. If not then received, the secretary of state sends for them. If then refused, and legal proceedings alone can be resorted to, delays naturally occurring and lasting for thirty days bring the time to the commencement of the new year, and the canvass may perhaps have gone on without the particular statement and an entirely different result secured than otherwise would have been. Or if the canvassers are to await the arrival of all the returns, their own term of office may expire by the first of the year, and their successors be unable to take possession or do an official act without a certificate or at least without questions and complications that ought not to exist. The real statements or the actual and honest copies thereof sent to the state officers are the important thing to be considered, and when these ministerial officials refuse the performance of their duties, the next best way to authenticate and prove the truth and genuineness of the statements can in our judgment be taken, and in this case, we think that, under all the facts, the steps taken to certify and authenticate the statements were valid, and the proceedings by which they were sent to and received by the secretary of state and the other state officers were sufficient to entitle them to be filed and considered by the board of state canvassers as the properly-certified result of the canvass of the board of county canvassers.

The other ground for directing the state canvassers to omit to canvass this return remains to be considered.

'he papers in substance allege that the b
vassers illegally canvassed the result of th
inspectors of election in the whole county,
›wn canvass in opposition to such returns, a
e ninety-two more plurality to Osborn than
he inspectors he was entitled to, and resulti
plurality of 14 votes in the senatorial di
Mr. Osborn. These allegations are nowh
papers used in opposition to the applicat
ius. Mr. Mylod simply gives a history of t
refusal of the secretary to sign and what th
› statement of the canvass as actually made
papers in opposition, but there is no explan
ion as to the manner of arriving at the a
ged in the moving papers. The whole case
ırn as a legal and valid one. Treating the
office of the secretary of state in the san
e certified by the county clerk and sent fro
y received and filed in the office of the sec
question presents itself as to the proper cour
Ve would then have a return which was on
valid, but in regard to which allegations v
'as the result of an illegal action on the par
vassing board by which that board departed
ıte sphere as a ministerial body and in exc
ion proceeded to make an invalid canvass,
ile embodied the result of such illegal canvas
s standing uncontradicted, we think the cor
per branch would have the power to comn
vassers to canvass without regard to such a
tained the result of an illegal and erroneous
rd of county canvassers in excess of its ju
ch thereby would alter the result of an elec
ıld not permit it to be canvassed. As to th
manner of the making of the return by th
state board could not itself inquire into the
f another return should be duly sent to the

ated and containing the result of the legal action of
of county canvassers, the state board could canvass it.
nk, as a result, that the order for the writ and the
f should be modified by striking out the provisions
a return to be certified by, and to come from the
erk of Dutchess county and issued under his seal, and
lified the order is affirmed.
ıcur.
d accordingly.

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atter of the Application of the PEOPLE ex rel. JOHN
EBY, Respondent, *v.* FRANK RICE et al., Composing
ard of State Canvassers, Appellants.

129 461
144 261
129 461
f 161 509

nandamus may be granted to compel ministerial officers to exer-
functions, where a specific duty has been imposed upon them
and they refuse to perform it, or do not conform to the law, or
ne legal right has been refused by them.
here a peremptory mandamus is applied for, which by its terms
restraint upon a board of state officers, engaged in the perform-
bout to perform a duty imposed by statute, and it is sought for
d as a restraining order or injunction, the limitation upon the
of such an injunction imposed by the Code of Civil Procedure
pplies; that is, it "shall not be granted except by the Supreme
a General Term."
of a board of state canvassers is purely ministerial, no judicial
re vested in them. They are simply authorized to compute the
t throughout the state and determine, upon statements made up
returns of the boards of county canvassers, what persons have
the greatest number of votes, and upon the statements so made
st declare those persons to be duly elected. No other evidence
eceived or used and no declaration may be made by such a board
s based upon a determination arrived at by the statements made
in an arithmetical manner from the various official returns
em.
ent returned by a board of county canvassers to the state board
lawfully contain anything save the whole number of votes given
unty, the names of the candidates, and the number of votes
each, and this must be made up solely from the original state-
the canvass returned by the inspectors in each and all of the
districts of the county.

Statement of case.

Such a board has no authority to transmit with their offici paper attacking the validityof the election, and if such a pa mitted the state board has no power to consider it.

(Argued December 11, 1891; decided December 29, 1891)

APPEAL from order of the General Term of th Court in the third judicial department, made D 1891, which affirmed an order of Special Term peremptory mandamus to issue.

The substance of the order and the facts, so far are stated in the opinion.

Isaac H. Maynard and *Delos McCurdy* for The application for a mandamus should have b because it asked for an order directing the sta abstain and refrain from doing something which proof that the board intended to do. (High on I dies, 14; *Brown* v. *Duane*, 60 Hun, 98; 14 A Encyl. of Law, 93, 105; *In re Whitney*, 3 N. Y. *Thomas* v. *M. M. P. Union*, 121 N. Y. 45.) T right to a peremptory writ must be determinec assumption that the opposing affidavits are true. *Fairman*, 12 Abb. [N. C.] 252; *People* v. *Board* Y. 627; *People* v. *Supervisors*, 73 id. 173; *Peop well*, 102 id. 477; *People* v. *Ecker*, 3 N. Y. *People ex rel.* v. *Cady*, 2 Hun, 224; *People ex re* 64 Barb. 162.)

William A. Sutherland for respondent. The of canvassers has no right to institute any inq irregularities at the polls. (*People* v. *Cook*, 8 N.

Joseph H. Choate, *Matthew Hale*, *J. F. Par Eugene Burlingame* for respondent, upon the sa points and authorities which appear in the case of *P Sherwood* v. *State Board of Canvassers* (*ante*, pag

J. In this matter, on certain affidavits
e by the Supreme Court, at Special Term
ıce of a writ of peremptory mandamus, co
board of canvassers to issue a certificate o
ance with the certified statements as to th
ın for senator in the sixteenth senatorial
held on November 3, 1891, filed with the
ıake a determination of the result of sai
ı, solely; disregarding and not considering
any other nature whatever relating to sai
ılt thereof, and without taking any proo
any papers, with reference to the determ
tion, except the said certified statements
statute by the boards of county canvass
composing the said senatorial district. T
pon which the order I have just referr
noted from, was granted, set forth a resolu
ard of canvassers of Rensselaer county to
transmitting the statements of the votes
ection to the state officers, there should
certain protest and certain objections, an
of the board of state canvassers be cal
l they be requested, before issuing a cer
o the office of senator, to consider such p
ıd such further proofs as may be present
ıe receipt, filing and proposed submission b
f the statement of the county board with
protest and papers. The moving paper
hat the protest, objections, or statements, r
ed upon alleged violations of the election l
hat there were irregularities in and illega
the election in question. These violations
ed to have been committed in the solicitatic
n feet of the polling place, in the intimic
f voters, in the repeating of votes and in
eturns to state the correct vote cast. The
rth in an affidavit by the opponent of the

rby, the relator here, and he makes t
gations. The affidavit of the secret
and the chairman of the state board
t the board had not proceeded to act
m Rensselaer county because of the l
t it has not refused, neglected, nor th
glect "to consider the statement in
l allowed by law," that there has beer
ertificate to the office of senator of th
trict to any person, nor has said boa
reof, stated what said board intended
l, in deponent's opinion, it is the inten
ceed in good faith to the discharge o
on them by law, etc.; that no demand
state board by the relator herein
ction should be issued to him."

If we were free to consider and determ
ety, to order the writ of mandamus to
should not hesitate to hold that it
nted by the Supreme Court at a Spe
writ is in form one of peremptory m
ce of its terms and commands in e
trains a board of state officers engagec
or about to perform, a duty imposed l
proofs it did not appear that the bo
inst whom the application was ma
glected, to perform any duty imposec
ended to commit any illegal act, nc
used the relator any legal right; hen
n for, nor propriety in, a peremptory
ich issues in order to compel minister
ir functions; or where a specific duty
and they refuse to perform it; or th
law; or when some legal right has
sing over the necessity for the wr
nibited by the moving papers, if it is p
training order, or injunction, whic

province in this case, then its issuance ought to be subject to the same statutory provision which imposes a restriction upon injunctions to restrain state officers. That is found in section 605 of the Code of Civil Procedure, which reads that "where a duty is imposed by statute upon a state officer, or board of state officers, an injunction order to restrain him, or them, * * * from the performance of that duty * * * shall not be granted, except by the Supreme Court at a General Term thereof, sitting in the department in which the officer or board is located, or the duty required to be performed." There is not enough in the case to overcome the legal presumption that the state officers would perform their statutory duties, and until that should appear, a peremptory mandamus would not lie. We think that this provision of the Code is applicable to all cases where the object of the proceeding is to restrain state officers, or boards, while engaged in the performance of a legal or statutory duty, and that its effect cannot be evaded by issuing a writ of mandamus, by the terms of which the state officers are restrained. The name does not alter the effect. The inhibition of the statute is jurisdictional, and an order not granted as prescribed is a nullity. However, because of the stipulation of the parties, which accompanies the record here, and because of the failure of the defendants to the proceeding to raise the objection, we have concluded to overlook the question of jurisdiction and to determine the questions at issue, upon their merits. We think, too, that the gravity of a question, which relates to the functions, duties and powers of the board of state canvassers, renders its determination by us appropriate at this time. Its importance is of the highest order.

There ought not to be any divergence of opinion, and there cannot be, as to what is the nature of these functions and duties, or what the limit of those powers. No judgment, which proceeds upon direct methods of reasoning, and which guides itself by the written law of the state, can fail to reach the conclusion that the office of these boards of canvassers is purely a ministerial one. Upon them devolves by statute the

obligation to fulfill precise functions. They are charged by the statute with absolute and certain duties. What those duties are to-day, they have always been since the legislature, acting under the authority of the Constitution of the state, undertook to direct the manner in which elections by ballot should be conducted. Citing the words of the law, the board shall, upon the certified copies of the statements made by the boards of county canvassers, proceed to make a statement of the whole number of votes given at such election for the various offices; each of which statements shall show the names of the persons to whom such votes shall have been given for either of the said offices, and the whole number of votes given to each, distinguishing the several districts and counties in which they were given. They shall certify such statements to be correct and subscribe the same with their proper names. Upon such statements, they shall then proceed to determine and declare what persons have been, by the greatest number of votes, duly elected to such offices, or either of them. They are then to make and subscribe on the proper statement a certificate of said determination, and shall deliver the same to the secretary of state. In that language is defined the scope of the duty of this board. There is no ambiguity in expression, nor are there any words of doubtful import. Nothing is left for any work of interpretation. The plain reading of the words of the law must be followed, and that inevitably forbids us to entertain an opinion that any judicial powers are vested in the board of canvassers. The members convene, under the statute, to determine upon the statements, which they must make from the statements returned by the boards of county canvassers, what persons have been by the greatest number of votes elected to office. They are not, in any general sense, to determine. They must determine upon such statements as they have made up in an arithmetical manner from the various official returns before them. It is upon such statements, so made, that they must declare what persons have been duly elected. That is the evidence, and all of it, which the statute permits in connection with the election and a declaration by

the board of canvassers of its results. No declaration can be made except as based upon a determination reached upon that particular evidence.

There is no latitude afforded by the law for any determination by boards of canvassers outside of the official returns, which the statute prescribes as the duty of the county canvassers to make and file. Those returns of the county canvassers may consist solely of statements by them, based upon an estimate of the votes cast for the various offices, as they appear upon the original statements of the canvass by the inspectors in each district. The statements returned by the county boards cannot lawfully contain anything save the whole number of votes given in each town and district, the names of the candidates and the number of the votes given to each. Thus it is perfectly evident, from the provisions of the statute, that the limits for the action of the state board of canvassers are fixed, and that there is an utter absence of warrant for their proceeding upon anything but the certified statements required by statute to be made and filed by the county boards, and then to be transmitted to the state officers. The board is called into a temporary existence by statute, and for the mere purpose of computing the votes cast throughout the state, as returned to them from the boards of the several counties, and to declare the result of such computation. It is but a part of the machinery constructed by the legislature for the purpose of determining and declaring the result of the votes cast at the election. It is a very essential part of the system devised for conducting elections by ballot; but its importance consists only in the fact that it is the mode selected for the determination and the declaration of the final results. To imply the possession of a power to determine otherwise than upon the evidence, which the statute provides for; to invest this board, so manifestly created for the fulfillment of a mere ministerial function, with any judicial powers, would be counter to the plain terms of the statute. In a government resting upon universal suffrage, the purity of the ballot and a correct count, and an exact return of the votes cast and counted, made in

strict compliance with the law enacted by the legislature for the conduct of elections, are essential conditions. To invest a body, which has been selected and created as a mode for ascertaining and declaring the general results of elections, with power to determine questions concerning the conduct or legality of an election, would, in my judgment, go far towards attacking one of those conditions and would be contrary to public policy.

The Constitution provides for elections by ballot and the legislature enacts laws respecting such elections and prescribes the mode of declaring and certifying the result. For the settlement of contests over elections courts exist, with adequate powers to investigate the causes of complaints, and for that end to take proofs and to adjudge accordingly; while as to the elections, returns and qualifications of its own members, each house of the legislature shall judge. These boards of canvassers derive their powers strictly from the statute. They cannot hear or consider evidence outside of the returns. They are restricted by the law of their creation to certain prescribed functions, and in their fulfillment they act under the written commands of the statute.

As long ago as the case of *People* v. *Cook* (8 N. Y. 67), in this court, it was said by Judge WILLARD that "the legislature has not clothed either the state officers, or the subordinate boards of inspection, with power to hear and determine, by the means of evidence *aliunde* the return, the intention of the voters. The strictness with which these boards should be held to the record before them is dictated by sound policy and enlightened wisdom." And again, speaking with reference to the acts of boards of county canvassers, the same judge said that, "with a regular return from the district inspectors, which is fair on its face, they have no right to go behind it * * * they must act upon it as a regular return and leave the parties aggrieved to their remedy through the courts of justice." The law, in the respects we are considering, was the same then as it is to-day.

The views we have expressed in this opinion, concerning the

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nctions of a board of canvassers, lead to the conclusion, in is case, that the state board was without any power to regard, to act upon anything before them, in relation to the election r senator in the sixteenth senatorial district, except those rtified statements which the county boards were directed by e statute to make. The alleged facts in the affidavits and in e protest of Mr. Collins, accompanying the official returns the county board, are not such as the board of state canssers can consider; or as should have been transmitted to e state officers. So far as they relate to violations of the ection law, they may be made the subject of criminal proedings, and so far as they attack the legality or validity of e relator's election, they may be made the subject of a const before the senate; which body possesses full jurisdiction hear and determine such contests.

For the reasons which have been given, the order appealed om should be affirmed.

All concur, ANDREWS and FINCH, JJ., in result.

Order affirmed.

THE PEOPLE ex rel. DAVID A. MUNRO, JR., Respondent, *v.* THE BOARD OF COUNTY CANVASSERS OF ONONDAGA COUNTY, Appellant.

here the sample ballots attached to a return of inspectors of election to the board of county canvassers show that the candidate was correctly named in the ballots, but through mistake or clerical error they are returned in a name differing slightly in the spelling or in some other particular, upon refusal of the said board to send back the return for correction, the candidate is entitled to a mandamus requiring it so to do before canvassing the vote.

e rule that the statement of votes cast for a candidate, written as required by the statute, upon a sample ballot attached to the return, may not be used by the board of county canvassers as the correct statement, when it differs from the statement of such vote given in the body of the return, but that the latter must govern, does not preclude the board, when it is material to determine the correct name of the person voted for, from inspecting the sample ballot.

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Where, however, upon application for a mandamus compelling the return for correction of a number of returns so defective, it appeared that the indorsement upon the official ballots used and voted in some of the election districts which contained the name of the candidate upon whose relation the application was made were defective in that the number of the election district was not stated therein, but instead thereof that of another district, *held* (ANDREWS, FINCH and PECKHAM, JJ., dissenting), that a provision in the order granting the writ requiring the county canvassers when the erroneous returns were corrected, to proceed and canvass the vote as it appeared on the face of the returns, and declare the result, was error.

(Argued December 15, 1891; decided December 29, 1891.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, made December 8, 1891, which affirmed an order of Special Term granting a peremptory writ of mandamus, the nature of which and the facts, so far as material, are stated in the opinion.

Louis Marshall for appellants. The board of county canvassers were not bound to allow votes returned as having been cast for David A. Munro, D. A. Monro or D. A. Munro, Jr., in favor of the relator, David A. Munro, Jr. (*People* v. *Ferguson*, 8 Cow. 102; *People* v. *Cook*, 8 N. Y. 67, 80; *Kortz* v. *Canvassers*, 12 Abb. [N. C.] 84; *Clark* v. *Bd. of Examiners*, 126 Mass. 282; *People* v. *Seaman*, 5 Den. 409; *Opinion of Justices*, 64 Me. 596; *People* v. *Tisdale*, 1 Doug. 59; *People* v. *Cicott*, 16 Mich. 283.) The board of county canvassers having declared by several resolutions that the returns from the first assembly district did not require correction, and that they did not consider that there were any clerical errors therein, the court did not possess the power to command them to make such decision. (*People ex rel.* v. *Leonard*, 74 N. Y. 443; 14 Am. & Eng. Encycl. of Law, 140; *People* v. *Supervisors*, 12 Johns. 415; *United States* v. *Guthrie*, 7 How. [U. S.] 284; *Board of Liquidation* v. *McComb*, 2 Otto, 541; *Secretary* v. *McGarrahan*, 9 Wall. 398; *People* v. *Atty.-General*, 22 Barb. 114; *People ex rel. Demarest* v. *Fairchild*, 67 N. Y. 334; *Commissioner of Patents* v. *Whitley*, 4 Wall.

522; *Howland* v. *Eldridge*, 43 N. Y. 45
Francis v. *Common Council*, 78 id. 39; *P*
able Life. Ins. Society v. *Chapin*, 103 id. 6
Millard v. *Chapin*, 104 id. 96; *People* v. *I*
[N. C.] 252; *People* v. *Contracting Bd.*,
id. 382; *People ex rel.* v. *Reardon*, 49 Hu
rel. v. *Bd. of Canvassers*, 126 N. Y. 39
Abb. Pr. [N. S.] 203; *People ex rel.* v. *Be*

William P. Goodelle for respondent. W
canvassers have refused or neglected to
required of them, they may be required by
form it. "They cannot by their neglect
imposing duties upon them." (*People* v.
Y. 318; *People ex rel. Smith* v. *Schiellien*,
ping on Mandamus, 11; *People* v. *Cook*, 8
v. *Board of Canvassers*, 12 Abb. [N. C.] 8
Case, 126 N. Y. 392; chap. 130, Laws of
Laws of 1844; *People ex rel.* v. *Board of*
Y. 401.) But even if the language of the s
sive merely it would, in this case, be constr
and the execution of the power insisted on
damus. (*People ex rel.* v. *Board of Sup*
401; Tapping on Mandamus, 14.) The bo
should have counted the votes cast for Da
A. Munro, D. A. Munro, Jr., in favor of
Munro, Jr. (§§ 5, 8, 10, 11, 16, 20, chap. 2
chap. 296, Laws of 1891; Election Co
Inspectors of election must accurately sta
names and ballots the electors actually
[N. C.] 98.) The undisputed evidence ap
face of the returns (including the body of t
sample ballots and indorsement thereon) co
notoriety and presumptive knowledge that Da
was the regularly nominated Republican can
of assembly in the first assembly district, an
of the returns in the districts referred to h

with being a candidate or with having received a single vote, while every sample ballot attached to said returns gave him all the Republican votes in said district, furnished ample ground for granting said order and the issuing of the writ thereon. (*People ex rel.* v. *Board of Canvassers*, 12 Abb. [N. C.] 95, 103.)

O'BRIEN, J. The order appealed from directed a mandamus to issue upon the petition of the relator to the board of county canvassers of Onondaga county directing and commanding them to cause certain statements of the vote for member of assembly in the first assembly district of Onondaga county cast at the general election on the third day of November last to be sent back to the board of inspectors of election in certain election districts, where the statement and returns made by said inspectors, containing certain errors of a clerical nature, should be corrected before the statements are canvassed by the board of county canvassers. It appears that votes are returned by the boards of inspectors as having been cast in various election districts in the assembly district for David A. Munro, D. A. Munro and D. A. Munro, Jr., which were in fact cast for David A. Munro, Jr., for member of assembly for the first assembly district of Onondaga county. In every case the sample ballots returned by the various boards of inspectors, and attached to their statement of the result of the vote for member of assembly in these several election districts, show that the ballots were all printed with the name of David A. Munro, Jr., and in that form deposited in the ballot-box, but that by mistake the printed blank statements used by the inspectors in making their return contained the name of the candidate variously spelled and designated as above mentioned. David A. Munro, Jr., was the Republican candidate for member of assembly in the first assembly district and he claims that the inspectors' returns should be sent back to them for correction. We think that upon such a state of facts a mandamus may properly issue to the county canvassers requiring them before canvassing

the vote to send such returns as contai
the board of inspectors for correctio
show that these votes, variously returne
slightly in the spelling and otherwise fr
were really cast for him and the correc
is fairly within the purview of the sta
ch. 130, title 5, § 15.) In the case of
Board of Canvassers (126 N. Y. 392),
ment of votes cast, required by the stat
sample ballot, could not be used by the
the correct statement of the votes cast f
didate when it contradicted or did n
ment of such vote embodied by the ins
their certificate, but that the latter mus
vassing and declaring the vote of the
principle does not preclude the inspect
it is material to ascertain the kind of
rect name of the person voted for or
the name, from inspecting the sample
the mandamus issued requires more to
the returns containing the clerical error
inspectors. It also requires the county
errors are corrected to proceed to
appears on the face of the statements
We have held in the case of *People ex*
of County Canvassers of Onondaga C
certain votes cast in some of the elec
be counted. That part of the order
to issue commanding the county c
inspectors' returns to be sent back to th
the clerical errors appearing in regard
ing should be affirmed, but the rest of
board to canvass should be reversed, a
modified accordingly.

All concur, except ANDREWS, FINCH
dissent as to modification.

Ordered accordingly.

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129-654

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Appellant.

While it is competent for the legislature, in an act providing for the consolidation of domestic corporations, to declare what shall be the status of the corporations availing themselves of its provisions, and also of the consolidated companies, it has no power to authorize the consolidation of domestic corporations with those of another state, without the consent of the legislature of that state, in such manner as to vest, in case of such a consolidation, the franchises, rights and property of the foreign corporation in the consolidated company, or to authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, or to confer any exclusive authority for their consolidation.

The act of 1869 (Chap. 917, Laws of 1869), authorizing the consolidation of certain railroad companies, upon such a consolidation, regards the consolidated company as a new corporation; but where the proposed consolidation is of a domestic corporation and one of another state, the consent of the legislature of that state is requisite to its accomplishment.

While, therefore, *it seems* when two or more domestic corporations are so consolidated, the resulting entity may properly be said to be a corporation "incorporated by and under a general and special law of this state," within the meaning of the "act to tax stock corporations for the privilege of incorporation" (Chap. 143, Laws of 1886), and so subject to the tax imposed by said act, when the consolidation is of a domestic corporation with a corporation of another state whose legislature has sanctioned such a consolidation, as the new corporation owes its existence, not to the state law alone, but to the concurrent legislation of the two states, it is not liable to such tax.

People v. *N. Y., C. & St. L. R. R. Co.* (61 Hun, 66), reversed.

(Argued October 27, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made the first Tuesday of May, 1891, directing a judgment in favor of plaintiff upon a case submitted under sections 1279–1281 of the Code of Civil Procedure.

The case was submitted to the General Term upon an agreed statement of facts substantially as follows:

The New York, Chicago and St. Louis Railroad Company was organized under the general railroad laws of New York,

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June 16, 1887, with a capital stock of $4,500,000. The railroad extended from Buffalo to the state line between New York and Pennsylvania. Before filing the certificate of incorporation with the secretary of state, $4,625, being one-eighth of one per centum upon the amount of capital stock, was paid to the state treasurer, as required by section 1 of chapter 143 of the Laws of 1886.

On the 15th day of August, 1887, an agreement for the consolidation of the above-named company with a company organized under the laws of Pennsylvania, owning a railroad extending from the westerly terminus of the above-named company's railroad to the westerly line of Pennsylvania, and having a capital stock of $3,000,000, was filed with the secretary of state. No tax was required to be paid before the agreement for consolidation was filed, and none was in fact paid. The agreement provided that the consolidated corporation should be called the New York, Chicago and St. Louis Railroad Company.

On the 27th day of September, 1887, an agreement for the consolidation of the last-named company with companies organized under the laws of Ohio and Indiana, owning railroads extending from the westerly line of the New York, Chicago and St. Louis Railroad Company's railroad to the westerly line of Indiana, and having together a capital stock of $22,500,000, was filed with the secretary of state. No tax was required to be paid before the agreement for consolidation was filed, and none was in fact paid. The agreement provided that the consolidated corporation should be called the New York, Chicago and St. Louis Railroad Company.

The capital stock of the first consolidated corporation was declared to be $7,500,000, which was the same as the aggregate capital of the New York and Pennsylvania corporations, and the capital stock of the second consolidated corporation — the defendant — was declared to be $50,000,000, which was the same as the aggregate capital of the New York, Pennsylvania, Ohio and Indiana companies.

The consolidation was effected, as far as the state of New

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York was concerned, under the provisions of chapter 917 of the Laws of 1869.

The question now presented is whether the defendant must pay a tax of one-eighth of one per centum upon the amounts mentioned in the agreements of consolidation as the capital stock of the consolidated companies; or, what is the same thing, upon the aggregate capital stock of the New York and Pennsylvania companies which entered into the first agreement, and of the New York, Pennsylvania, Ohio and Indiana companies which entered into the second agreement.

Upon these facts judgment was rendered against the defendant for $57,856.25, which is one-eighth of one per centum upon the aggregate capital stock above mentioned; and it was also adjudged that defendant should be restrained from exercising any corporate powers until that amount should be paid.

Further facts are stated in the opinion.

Samuel E. Williamson for appellant. If the new company, resulting from the consolidation of a railroad company organized under the laws of this state with a railroad organized under the laws of another state, is a corporation in any sense, it is not a corporation "incorporated by or under any general or special law of this state," within the meaning of chapter 143 of the Laws of 1886. (*O. & M. R. Co.* v. *People*, 133 Ill. 467; *C. & N. W. Co.* v. *Auditor-Genl.*, 53 Mich. 79; 46 id. 225; Laws of 1869, chap. 917, § 6.) The consolidation of railroad companies organized under the laws of several states does not effect the incorporation of a new company in all or any of the states, and, therefore, the defendant is not liable for the organization tax claimed. (*State* v. *A. & N. R. Co.*, 24 Neb. 143; *C. R. R. Co.* v. *Georgia*, 22 U. S. 665; *Shields* v. *Ohio*, 95 id. 319; *R. R. Co.* v. *Georgia*, 98 id. 359; *R. R. Co.* v. *Maine*, 96 id. 499; *Meyer* v. *Johnston*, 64 Ala. 603; *Jones* v. *F. R. R. Co.*, 50 Hun, 310; *Day* v. *Worcester*, 151 Mass. 302; *N. & C. B. Co.* v. *Wooley*, 78 Ky. 523; *N. R. R. Co.* v. *B. & L. R. R. Co.*, 136 U. S. 356;

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Jones on Mort. §§ 361, 363; *Williams* v. *W. U. T. Co.*, 93 N. Y. 162.) If the defendant is liable for an organization tax, it is liable only for one-eighth of one per cent of the capital stock authorized by this state, which in the case of each consolidation is the amount of the capital of the constituent company incorporated in this state. (46 Mich. 224.) If the statute makes the defendant liable for a franchise tax upon that part of the capital stock represented only by the property of constituent companies organized under the laws of other states, it is void, as being in conflict with the Fourteenth Amendment of the Constitution of the United State. (*State Treasurer* v. *Auditor-Genl.*, 46 Mich. 224; *R. R. Co.* v. *Pennsylvania*, 15 Wall. 300; *R. R. Co.* v. *Jackson*, 7 id. 262.) The state is not entitled to a money judgment for the tax and interest. (*People* v. *Cook*, 110 N. Y. 443.)

Charles F. Tabor, *Attorney-General*, for respondent. Upon filing the papers constituting the agreement and proceedings for the consolidation of the New York, Chicago and St. Louis Railroad Company No. 2, and of the Cleveland and State Line Railroad Company, and the Fort Wayne and Illinois Railroad Company, a new corporation was created also called the New York, Chicago and St. Louis Railroad Company, the defendant in this action, which was incorporated under and by virtue of the laws of the state of New York, and as such became liable to pay the organization tax imposed by the act of 1886. (*People ex rel.* v. *Cook*, 10 N. Y. S. R. 650; 110 N. Y. 443; *McMahon* v. *Morrison*, 16 Ind. 172; *R. & M. R. R. Co.* v. *F. L. & T. Co.*, 49 Ill. 349; *A. & R. A. L. Co.* v. *State*, 63 Ga. 483; *State of Ohio* v. *Sherman*, 22 Ohio, 411; *Ridgeway Township* v. *Griswold*, 1 McCrary, 151; *Clearwater* v. *Meredith*, 1 Wall. 25; *Shields* v. *Ohio*, 95 U. S. 319; *R. R. Co.* v. *Maine*, 96 id. 499; *R. R. Co.* v. *Georgia*, 98 id. 359; *St. Louis Ry. Co.* v. *Berry*, 113 id. 465; *P. C. Co.* v. *M. P. R. R. Co.*, 115 id. 594; *People* v. *Rice*, 57 Hun, 486.) The defendant is, in fact, a new corporation. (3 R. S. [8th ed.] 1723.) Powers

of a corporation organized under a legislative charter are only such as the statute confers, and the enumeration of them implies the exclusion of all others. (*Abbott* v. *J. R. R. Co.*, 80 N. Y. 27; *Thomas* v. *R. R. Co.*, 101 U. S. 71; *C. T. Co.* v. *P. P. C. Co.*, 139 id. 24.) Sections 1 and 6 of the act of 1869 clearly show that the legislature intended to include foreign corporations as well as domestic corporations among the corporations entitled to the benefits of the provisions of this act. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. (*H. Ins. Co.* v. *New York*, 134 U. S. 600; *Doyle* v. *C. Ins. Co.*, 94 id. 535; *New York* v. *Miln*, 11 Pet. 139; *Presser* v. *Illinois*, 116 U. S. 268; *Embury* v. *Conner*, 3 N. Y. 511; *Sherman* v. *McKeon*, 38 id. 267; *Phyfe* v. *Elmira*, 45 id. 103; *People* v. *Cook*, 110 id. 449.) This court having already determined the effect upon domestic corporations consolidating under statutes similar to that of 1859, no other or different rule can or ought to be adopted in construing the statute of 1869 so far as it applies to corporations of other states consolidating with domestic corporations of this state. (*P. Co.* v. *S. L. & A. R. R. Co.*, 113 U. S. 296; *M., etc., R. R. Co.* v. *Alabama*, 107 id. 584; *Clark* v. *Barnard*, 108 id. 451; *R. R. Co.* v. *Harris*, 12 Wall. 82; *R. R. Co.* v. *Whitton*, 13 id. 270; *R. R. Co.* v. *Vance*, 96 U. S. 450; *M. & C. R. R. Co.* v. *Alabama*, 107 id. 581.) The liability of the defendant is not affected by the provisions of the sixth section of the act of 1869. (Laws of 1886, chap. 143; *People* v. *E. T. Co.*, 96 N. Y. 387; *People* v. *H. S. Co.*, 105 id. 76.)

ANDREWS, J. This case depends upon the question whether the defendant is, within the meaning of chapter 143 of the Laws of 1886, a corporation "incorporated by or under any general or special law of this state." The act of 1886, is entitled "An act to tax stock corporations for the privilege of organization." The material part of the first section is as

follows: "Section 1. Every corporation, joint-stock company or association incorporated by or under any general or special law of this state, having capital stock divided into shares, shall pay to the state treasurer, for the use of the state, a tax of one-eighth of one per centum upon the amount of capital stock which said corporation, joint-stock company or association is authorized to have, and a like tax upon any subsequent increase thereof. The said tax shall be due and payable upon the incorporation of said corporation, joint-stock company or association, or upon the increase of the capital thereof, and no such corporation, joint-stock company or association shall have or exercise any corporate powers until the said tax shall have been paid. And the secretary of state and any county clerk shall not file any certificate of incorporation or articles of association, or certify or give any certificate to any such corporation, joint-stock company or association until he is satisfied that the said tax has been paid to the state treasurer."

The original corporation in this state, known as the New York, Chicago & St. Louis Railroad Company, organized in 1887, was a purely domestic corporation. It became a corporation by taking the proceedings and filing its articles of association prescribed by the General Railroad Act of 1850. It paid the organization tax on its capital of $4,500,000, and constructed its road from Buffalo to the Pennsylvania state line as authorized by its charter. In the same year it consolidated with the Erie and State Line Railroad Company, a Pennsylvania corporation having a capital of $3,000,000. The consolidated company took the name of the New York corporation and its capital stock was the aggregate of the capital stock of the two constituent corporations, viz.: $7,500,000. Later in the same year (1887) the first consolidated company consolidated with certain railroad corporations then existing in Ohio and Indiana, having an aggregate capital of $22,500,000. The company resulting from the second consolidation also took the name of the "New York, Chicago & St. Louis Railroad Company," the aggregate capital of which was $30,000,000, which was the

sum of the combined capital of all the constituent comp
The several roads thus consolidated formed a continuou
of railroad extending from Buffalo in this state to Chic
the state of Illinois.

The claim on the part of the people is that these con
tions having been effected under the authority of chapt
of the Laws of 1869, entitled "An act authorizing th
solidation of certain railroad companies," there was by
of said act a new incorporation created on each consoli
and that the resulting company was a corporation "incorp
under a general or special law of this state," within c
143 of the Laws of 1886, and, therefore, bound to p
organization tax imposed by that act. The state, the
demands and has recovered the sum of $57,856.25, w
one-eighth of one per centum on $7,500,000, the capital
first consolidated company, and one-eighth of one per c
on $30,000,000, the capital of the second consolidated con
with interest added. By the judgment below the st
New York exacts a tax on the portion of the capital st
the consolidated company contributed by the Pennsy
Ohio and Indiana corporations, of about $50,000, for the
lege of consolidation with the New York corporation.
is required by the true construction of the act of 18
judgment must be affirmed, however unjust or impolit
exaction may seem to be.

As a tax on property, it would be clearly invalid, for
by Judge COOLEY in the case of *State Treasurer* v. *A*
General (46 Mich. 224), referring to a consolidated r
from Buffalo to Chicago, which included a Michigan c
tion, "the state can no more tax the whole capital which
sents the track from Chicago to Buffalo, the rolling stoc
other equipments, than it can tax the whole track and
ments." But the tax imposed by the act of 1886, being
on the privilege of consolidation, and not a property ta
power of the state to subject corporations availing them
of the act, to any conditions the legislature may se
impose cannot be questioned.

We come, then, directly to the question whether the defendant is a corporation "incorporated by or under any general or special law of this state;" within the meaning of the act of 1886. The only incorporating act of this state to which the incorporation of the defendant can be referred, is the consolidation act of 1869. That act provides in great detail for the consolidation of railroad corporations "organized under the laws of this state, or of this state and any other state," operating a railroad either wholly within, or partly within and partly without the state, and forming a continuous or connected line of railway. The first section authorizes roads so situated to merge and consolidate their "capital stock, franchises and property." The second section prescribes that the consolidation shall be effected by means of an agreement between the constituent companies, which shall prescribe the means and conditions of the consolidation, the name of the "new" corporation, the names of the first directors and officers, the number of shares of the capital stock and the amount and par value thereof, and the manner of converting the capital stock of the constituent companies into that of the new corporation, with a proviso that in no case shall the capital stock of the company formed by the consolidation exceed the aggregate sum of the capital stock of the companies so consolidated, and the section provides that the agreement of consolidation, when made and certified, shall be filed in the office of the secretary of state. The third section declares that on perfecting and filing the agreement, the "parties hereto shall be deemed and taken to be one corporation by the name provided in said agreement, but that such act of consolidation shall not release such new corporation from any of the restrictions, disabilities or duties of the several corporations so consolidated." The fourth section purports to vest in the "new corporation" the rights, privileges and franchises, and all property, real and personal, debts and stock subscriptions of the corporations so consolidated. The fifth section continues the constituent companies in existence to preserve the rights and liens of creditors, and authorizes suits to be maintained against the

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their provisions, and also of the consolidated company. Whether the new consolidation shall create a mere business union between the constituent companies, leaving them in existence as corporations, or whether it shall operate as a surrender of the corporate franchises and an extinguishment of their corporate existence, and as creating a new corporation combining to the extent permitted by the act, the powers of the corporations out of which it was formed, and vesting in it the property of the constituent companies, depends upon the legislative intention. Where under the act the result of the consolidation is a new corporation in place of two or more domestic corporations, the resulting entity may properly be said to be a corporation "incorporated by or under a general or special law of this state," and, therefore, subject to the organization tax prescribed by chapter 143 of the Laws of 1886.

But the constituent companies which were united to form "The New York, Chicago and St. Louis Railroad Company," with the exception of the New York company of the same name, were not domestic corporations. Their corporate powers and life were derived from the legislatures of other states. They were and are in no respect subject to the laws of this state, but wholly and exclusively to the laws of their domicile. It was under those laws that the respective roads were constructed and operated. The laws of their jurisdictions fixed their capital, conferred and defined their franchises and powers, and their power to enter into any consolidation with other roads, either within or without the states which incorporated them, depended upon the affirmative grant of such power by the state creating them. The Consolidation Act of 1869, it is true, assumes upon the consolidation not only of domestic corporations, but of corporations of different states, to transfer to and vest in the consolidated company formed under its provisions all the "rights, privileges, exemptions and franchises and property" of each of the constituent companies. But the legislature of this state was impotent alone to accomplish this result. It could not vest the franchises, rights and property

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eral (46 Mich. 224); *C. & N. W. Railway Co.* v. *Aud.-Genl.* (53 id. 79), and *O. & M. Railway Co.* v. *People* (123 Ill. 467).

We desire to refer also to the dissenting opinion of LANDON, J., in the court below.

The judgment of the General Term should be reversed and judgment ordered for the defendant on the case presented.

All concur.

Judgment reversed.

REBECCA M. E. QUACKENBUSH *v.* MARIA O'HARE et al.

SYLVANUS T. CANNON, Respondent, *v.* GEORGE W. WASHBURN et al., Appellants.

The court may not release a lien, without actual payment, merely because the holder thereof has also a lien upon other property, to which he may resort for the satisfaction of his debt, and which the proof shows is sufficient for that purpose.

Upon application for surplus moneys arising on foreclosure sale, it appeared that there were two mortgages which were liens upon the premises sold subsequent to the mortgage foreclosed; the senior one also covered other lands, which the proof showed and the referee found were of value more than sufficient to satisfy the mortgage, and the junior mortgage only covered those premises. *Held*, that the court had no power to displace the prior lien in favor of the junior mortgage, and to compel the owner of the former to resort to the other lands covered by it to obtain payment.

As to whether, if the owner of the junior mortgage had offered to pay the prior one and demanded an assignment of it, he could have been subrogated to all the rights of its owner as against the other real estate, *quære*.

Reported below, 61 Hun, 386.

(Submitted November 30, 1891; decided January 20, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made October 16, 1891, which affirmed an order of Special Term confirming the report of a referee as to the distribution of surplus moneys.

The substance of the order and the facts, so far as material, are set forth in the opinion.

Earley & Prendergast for appellants. The $2,000 mortgage under which Cannon claims, but which Steers, in fact, holds,

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1 Beasley (N. J.) 155; *Cheesebrough* v. *Millard*, 1 Johns. Ch. 409; *Reynolds* v. *Tooker*, 18 Wend. 591.)

Samuel Untermyer and *Moses Weinman* for Murray Hill Bank, respondent. The equities of the Murray Hill Bank are superior to those of Washburn & Barnes and of Steers. In marshaling the securities, as between Washburn & Barnes on the one hand and Cannon and Steers on the other, the court should not trench upon or prejudice the rights of the Murray Hill Bank. (*Berry* v. *Ins. Co.*, 2 Johns. Ch. 603; *Grosvenor* v. *Allen*, 9 Paige, 74; Pom. Eq. Juris. 1414; *Evertson* v. *Booth*, 19 Johns. 486, 493; *Woolcocks* v. *Hart*, 1 Paige, 185; *Jervis* v. *Smith*, 7 Abb. Pr. [N. S.] 217; *Leib* v. *Streibling*, 51 Md. 285; *Marr* v. *Lewis*, 31 Ark. 203; Bispham on Equity, 403; *Reynolds* v. *Tooker*, 18 Wend. 591; *Ayers* v. *Husted*, 15 Conn. 504; *John* v. *Reardon*, 11 Md. 465.) The rule of selling separate parcels covered by a mortgage in the inverse order of alienation cannot be invoked. But if the property included in the Cannon mortgage be so applied, the Second avenue property would be liable in the first instance. (Pom. Eq. Juris: § 1225; *Chapman* v. *West*, 17 N. Y. 125; *N. Y. L. Ins. Co.* v. *Cutler*, 3 Sandf. Ch. 176; *L. F. F. Ins. Co.* v. *Bill*, 22 Barb. 54.)

O'BRIEN, J. The order appealed from disposed of surplus moneys amounting to the sum of $2,737.75, arising upon the foreclosure of a mortgage made by the defendant to one Elizabeth Hillenbrand, February 28, 1884, and recorded the following day. It was subsequently assigned to the plaintiff and covers certain premises on Second avenue in the city of New York. The controversy in regard to the surplus was between the defendant Cannon on the one hand and the defendants Washburn & Barnes on the other. The referee reported that Cannon was entitled to have his claim paid out of the fund first, and this report was confirmed at the Special Term, and the order of that court affirmed at General Term. Washburn & Barnes are the only parties who appeal to this court.

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street and West Third street property are not parties to this action. Had all the parties interested in these two pieces of property been made parties to this action, and all the property sold and the proceeds in court, it is possible that a court of equity could apply the doctrine of sale in the inverse order of alienation, or would so marshal the securities as to accomplish the purpose which Washburn & Barnes seek to attain in these proceedings. (*Burchell* v. *Osborne*, 119 N. Y. 486.) But that must be done in an action for that purpose where the whole fund resulting from the sale of all the pieces of property is under the control of the court, and all the parties interested are before it. There is no room for the application in a proceeding like this, and upon facts such as exist here, of the equitable rule that where a creditor has a double fund to which he may resort for satisfaction of his debt, and another creditor has only one of these funds, the first creditor will be required *primarily* to resort to that fund for the satisfaction of his debt, over which he has the exclusive control. That rule, of course, implies the right of the creditor with the double fund or security to appropriate both funds if necessary. The attempt is made in this proceeding to displace the prior lien of Cannon not by payment, but by proof which, it is claimed, shows that the remaining two pieces of property are sufficient to pay the debt. But the owner of a mortgage cannot be deprived of his lien on the application, in a proceeding like this, of a junior mortgagee upon proof, however strong or apparently conclusive, that he still has sufficient property to pay his debt. The court cannot release a lien without actual payment merely because witnesses testify, and the referee finds, that the holder of the lien has other property of his debtor to which he can resort for the satisfaction of his debt. Had Washburn & Barnes offered to pay the prior mortgage held by Cannon, and demanded an assignment of it, it is possible they might be subrogated to all the rights and to the position of Cannon, and after receiving the surplus money here be entitled to call upon the owners of the Seventy-fourth street and West Third street property to contribute towards the payment of the mortgage.

But whatever equitable rights they might hav
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finding that the other property is sufficient
and discharge the debt secured by the lien. T
any, is by means of some other proceeding.

The order should, therefore, be affirmed, wi

All concur, ANDREWS and GRAY, JJ., in res

Order affirmed.

CASSA MARITTIMA, Respondent, *v.* PHŒNI
COMPANY, Appellant.

A maritime lien having once attached, cannot be divest
policy of insurance thereon, without payment, relea
the part of the assured.

Plaintiff loaned to the master of a vessel a sum of mone
the vessel and cargo. By the instrument creating th
agreed to pay the loan on arrival of the vessel at the
and assigned enough of the freight to cover it. In c
loan was not to be paid. On the back of the instrum
tain conditions, to which the loan was made subject;
declaring that the owner or captain should not take a
upon the same freight at the port of loading, or in su
themselves "bound to return the present loan, even
be lost." In an action upon a policy of insurance is
on the advances so made, it appeared that the master
loan upon the freight at the port of loading, but with
privity or consent of plaintiff or its agents. The ve
sailing from the port of loading by perils of the s
maritime character of plaintiff's loan and its insurabl
affected by the wrongful act of the master; and so, tha
to the action, that the obligation of the master arisi
was collateral merely to the principal security, *i. e.*,
way affected its validity, or that of the insurance thei

Reported below, 59 Hun, 361.

(Argued December 2, 1891; decided January 20, 1892.

APPEAL from judgment of the General Term
Court in the first judicial department, entered

Statement of case.

made January 21, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

This was an action upon a policy of marine insurance.

The facts, so far as material, are stated in the opinion.

Edward P. Lyon for appellant. The plaintiff had no insurable interest in the draft. (1 Arn. on Mar. Ins. 10; 1 Pars. on Mar. Ins. 208; 2 Pars. on Cont. [7th ed.] 636, 637; *Meyer* v. *Isaac*, 6 M. & W. 612; *Cole* v. *White*, 26 Wend. 515; 2 Marsh on Ins. 633; *Stainbank* v. *Fenning*, 11 C. B. 88; *Stainbank* v. *Shephard*, 13 id. 418; *The Nelson*, 1 Hagg. 169; *The Atlas*, 2 id. 48–54; *The Emancipation*, 1 Wm. Rob. 121; *Jennings* v. *I. Co.*, 4 Binn. 244; Arnould on Mar. Ins. 38–40; *Greeley* v. *Waterbone*, 19 Me. 9; *The Hunter*, 1 Ware, 251; *Leland* v. *The Medora*, 2 W. & M. 92, 107; *Ruche* v. *Corygham*, 2 Pet. 295, 303; *The Draco*, 2 Sumn. 157, 186, 188; *Bray* v. *Bates*, 9 Met. 237; *The William and Emeline*, B. & H. 66; *The Atlantic*, 1 Newb. Adm. 514; Jones on Pledges, § 176.) The second loan on the freight at the port of loading was a breach of warranty, or at least a material misrepresentation. (*The Gratitudine*, 3 Rob. Adm. 266; *The Nelson*, 1 Hagg. Adm. 169; *The Gauntlet*, 3 W. Rob. 82; *The Virgin*, 8 Pet. 552; 2 Pars. on Cont. [7th ed.] 522; *Lewis* v. *E. Ins. Co.*, 10 Gray, 508.)

Edward K. Jones for respondent. The security against the ship and freight, and, consequently, the marine risk continues until the owners themselves not only agree to be bound, but actually discharge the obligation. Additional personal security is permitted in such cases, and the claim upon the *res* nevertheless continues until the personal obligation is discharged. (1 Pars. on Mar. Ins. 213; *Stainbank* v. *Fenning*, 11 C. B. 84; *The Hunter*, 1 Ware, 251.) It is not necessary that a contract shall be maritime in order to be insurable under the law of this state. (Laws of 1849, chap. 308; *Force* v. *W. P. Ins. Co.*, 35 Fed. Rep. 767.)

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hold themselves bound to return the present loan even though the vessel be lost." It was admitted on the trial that the owner or captain did, without the knowledge, privity or consent of the plaintiff, unless such consent was given by the execution and delivery of the instrument above set forth subject to the rules and regulations indorsed thereon, take other advances amounting to $1,100 upon the same freight at the port of loading. On the 18th of September, 1886, the plaintiff's New York agent procured from the defendant upon payment of the required premium, a policy of insurance to said agent, on account of whom it may concern, for $2,000 whereby the defendant insured "lost or not lost, at and from Pensacola to Montevideo and (or) Buenos Ayres, on advances against captain's drafts upon the freight of all kinds of lawful goods and merchandize, laden or to be laden on board the good bark *Buoni Amici* whereof is master for the present voyage." The vessel sailed from her port of loading but was lost by perils of the sea and of course did not earn her freight which was pledged for the payment of the loan, and the plaintiff sought indemnity from the defendant under its policy. The defendant resists the claim on a single ground only, and that is that by force of rule fifteen, endorsed upon the draft, to the effect that if the owner or master of the vessel took other advances upon the same freight, at the port of loading, they should hold themselves bound to return the loan, even though the vessel be lost, and that as the master did take a further loan upon such freight at the port of loading, though it was without the knowledge, privity or consent of the plaintiff or its agents, this act of the master created a personal obligation and destroyed the maritime character of the plaintiff's loan, and its insurable interest, and thus defeated its right to recover on the policy. The defendant argues that a marine risk and not a personal obligation or promise is the subject of insurance. That when a loan is made upon pledge of the ship and freight a maritime lien is thereby created which is the subject of insurance, by the person in whose favor it is created. It is no doubt, true that it is an essential feature of such a loan that if the ship be

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marine insurance companies (Ch. 308, Laws 1849), under which statute the defendant was created and exists as a corporation, authority is given "To make insurance upon vessels, freight, goods, wares, merchandize, specie, bullion, jewels, profits, commissions, bank notes, bills of exchange, and other evidence of debt, bottomry and respondentia interests, and to make all and every insurance appertaining to or connected with marine risks and risks of transportation and navigation," and that, therefore, the defendant is liable upon its policy in this case, whether the plaintiff had, at the time of the loss, a maritime lien or not. But secondly, the plaintiff contends that, under certain circumstances, a maritime lien and a personal obligation may exist together as security for the same loan, and the defendant's counsel, within certain limitations, does not dispute this. The proposition, however, in his view is limited to cases where the personal obligation of the owner or master is collateral merely, and where the additional personal obligation conforms to the maritime lien itself, that is to say, is of no avail to the lender if the ship be lost. In other words, if the personal obligation shares the fate of the lien itself, and falls with it by the loss of the ship, then the maritime character of the loan remains intact, and the maritime interest in the freight, or subject hypothecated, remains undisturbed. The application of this principle to the facts of this case is the point of difference between the parties. Both rely upon substantially the same cases and authorities to establish positions radically antagonistic with reference to the rule of law. (Parsons on Marine Insurance, vol. 1, pp. 208, 213, 223; *The Hunter*, 1 Ware, 251; *Stainback* v. *Fenning*, 11 C. B. 51; *Stainback* v. *Shepard*, 13 id. 418; *Cole* v. *White*, 26 Wend. 515; *Bray* v. *Bates*, 9 Met. 250.)

It is not claimed that the master, by taking subsequent advances at the port of loading on the same freight, created, by force of the rule referred to and printed on the back of the instrument, any personal obligation as against the owner of the vessel with reference to the loan in question. The plaintiff attempted to enforce such an obligation in the courts of the

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ever incurred by the master by reason of an act on his part which was thought merely possible that it should have the effect of destroying and divesting the interest or special property which vested in the plaintiff after the making of the loan, and the execution and delivery of the instrument by the master and upon the faith of which the plaintiff made the advances. The additional promise that was to arise out of the master's act was contingent upon a future event and collateral merely to the principal security, that is to say, the lien. The lien having once attached could not be divested so as to avoid a policy thereon without payment or release or some act on the part of the plaintiff. Granting that when the master took the subsequent advance an obligation came into existence against him to pay the plaintiff's loan that would not disturb the contract relations created between the plaintiff and defendant by the instrument which the master executed and the policy of insurance. The new and additional obligation of the master might come into existence and could stand as against him should the plaintiff elect to so treat it, but how could that destroy a prior security when the plaintiff did not intend to substitute it for the lien, and in fact had no knowledge of its existence because it had no knowledge of the act of the master in taking the further advances out of which act the promise on his part was to arise, if at all? The wrongful act of the master was without the knowledge, consent, privity or procurement of the plaintiff, but if, notwithstanding that, a promise to pay the loan on the part of the master arose from the act, such a promise could not, without the plaintiff's consent, destroy and take the place of an existing maritime lien. The promise of the master, if it ever came into existence against him, might stand as collateral to the lien on the freight and ship, but cannot affect the validity of the maritime lien unless the master paid plaintiff's loan, in which case the lien, of course, would be discharged. Whatever construction may be given to the printed rule on the back of the draft, it is clear, we think, that the parties to the transaction never intended, when the loan was made, that the subsequent wrongful act of the master in taking another

Statement of case.

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et al., Respondents, *v.* JOHN
Impleaded, etc., Appellant.

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er 4, 1891; decided January 20, 1892.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which overruled defendants' exceptions and ordered judgment on verdict directed in favor of plaintiffs.

This was an action to charge defendants, as general partners of the firm of P. Lenk & Co., a limited partnership, with a debt of said firm.

The facts, so far as material, are stated in the opinion.

Lucien Birdseye for appellant. It was incumbent upon plaintiffs to prove some invalidity, or irregularity or defect, which converted the special or limited partnership into a general one. (1 R. S. 767, § 4.) The entries in the books of Lenk & Co. prior to November 10, 1885, were not competent as partnership matters. (*Baker* v. *Stacpole*, 9 Cow. 420; *Brisban* v. *Boyd*, 4 Paige, 17; *Martin* v. *I. L. Ins. Society*, 53 N. Y. 339; *Pickett* v. *Leonard*, 34 id. 175; *Smith* v. *Kirtley*, 1 Monroe, 79; *U. S. Bank* v. *Binney*, 5 Mason, 176; *Fairchild* v. *Fairchild*, 64 N. Y. 171; *Lodge* v. *Prichard*, 3 DeG., M. & G. 906; *Cheever* v. *Lamar*, 19 Hun, 130; *Allen* v. *Coit*, 6 Hill, 318.) Neither were these entries made competent as evidence against Lindenmeyr, by such proof as is necessary to charge a party with matters charged against him in books of account. (*Doe* v. *Turford*, 3 B. & A. 870; *Brewster* v. *Doane*, 2 Hill, 537; *Webb* v. *Ambler*, 8 N. Y. 170; *Ocean Nat. Bank* v. *Carll*, 55 id. 440; *Chaffee* v. *United States*, 18 Wall. 516–541; *Maxwell* v. *Wilkinson*, 113 U. S. 656; *Case* v. *Potter*, 8 John. 211–213; *Tirrell* v. *Sutherland*, 11 Wend. 568; *Sickels* v. *Mather*, 20 id. 72; *Foster* v. *Coleman*, 1 E. D. Smith, 85; *Knight* v. *Cunnington*, 6 Hun, 100; *Ives* v. *Waters*, 30 id. 297; *Beatty* v. *Clark*, 44 id. 126; *McGoldrick* v. *Traphagan*, 88 N. Y. 334; *Russell* v. *H. R. R. R. Co.*, 17 id. 134; *Downs* v. *N. Y. C. R. R. Co.*, 47 id. 83; *Gilbert* v. *Sage*, 57 id. 639.)

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. *Kitchen*, 26 Hun, 173; .
471; *Cheever* v. *Lamar*,
404; Bates on Part. § 978
'. *Sherburne*, 15 Johns. 4(
Y. 512.)

The certificate of the forma
Lenk & Co., in which th
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had contributed $20,000
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Opinion of the Court, per ANDREWS, J.

The complaint alleges that when the former action was brought the plaintiffs were ignorant of the connection of Lindenmeyr and Huber with the firm of P. Lenk & Co. The plaintiffs, for the purpose of establishing the falsity of the affidavit that Lindenmeyr paid in in cash his capital in the new firm, were permitted to show entries on the books of the prior firm of P. Lenk & Co., crediting him with two loans made to that firm in August and September, 1885, aggregating $20,000, and a subsequent entry made on or about November 6, 1885, in the same books, crediting a similar sum to his capital account of the new firm. Without going into details it is sufficient to say that the entries admitted, if competent, permit an inference that Lindenmeyr's contribution to the new firm was not made in actual cash, but by a satisfaction of his debt against the prior firm, and a credit of an equal amount to his capital account in the new firm. If this was the fact, the transaction was not a payment in cash and did not satisfy the requirements of the Limited Partnership Act. (*Van Ingen* v. *Whitman*, 62 N. Y. 513.)

We are of opinion that the entries in the books of the old firm, made prior to the time when the new partnership was to commence, and which so far as appears were not known to Lindenmeyr, were inadmissible against him. It is the general rule that entries in partnership books made in the ordinary course of business, are admissible in actions between the partners, and that they are also competent in favor of third persons in actions against the partners, as in the nature of admissions by the partners of the facts stated. (Lindley on Part. 404; Balis on Part. 978; 1 Phillips on Ev. 449; 2 Wharton on Ev. § 1132.) But the books of the prior firm were as to Lindenmeyr *res inter alios acta*. They were not competent against him on the principle of agency, or on the ground that he is presumed to have known their contents. The circumstances afford no ground for such a presumption. He had no right to examine the books, and there is no evidence that he had actual knowledge of their contents. There seems to have been an interval of a few days between the expiration of the prior

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The old firm doubtless contin
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GER, Respondent, *v.* THE MANH
COMPANY et al., Appellants.

ad in a city street, erected and operate
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In an action by an abutting owner to
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ght, air and access.

Statement of case.

In such an action plaintiff, besides giving evidence as to interference by defendant with his easements of light, air and access, gave evidence, without objection of the annoyance suffered from interference with his privacy in the occupancy of his premises, and from noise occasioned by the operation of the railroad, and also that the railroad and its structures intercepted the view of persons passing his premises on the other side of the street. The trial court was not asked to restrict the bearing of this evidence as to such annoyances and the interception of the view to the temporary or rental damage; but was requested to find that there was no easement or other interest appurtenant to plaintiff's premises entitling him to be protected against loss or privacy due to the use of the street, if such use was authorized by the municipality and the state, or which would entitle him to the use of the street for the purpose of having the exterior of his premises conspicuously visible from the other side of the street, or which would authorize him to control the amount of noise made in the street. The court refused so to find. *Held*, that the matters referred to in the request, and the evidence relative thereto, were competent and proper to be considered as bearing upon the rental value, although not competent as bearing upon the fee damages, and as it did not appear that the court took them into consideration in assessing the fee damage, the refusal was not error.

Plaintiff recovered judgment, assessing his fee damages at $2,000, staying the operation of defendant's road until that sum should be paid, and providing that if defendant removed its station, stairs and approaches, it need pay only $1,500. There was no witness who made precisely such a division of the damages. *Held*, no error; that from the estimates of the witnesses and the facts and circumstances, such an apportionment of the fee damage was justifiable.

(Argued December 7, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made February 13, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

Samuel Blythe Rogers for appellants. It was error to refuse to find that plaintiff had no easements of quiet, privacy or conspicuousness. (*Kane* v. *N. Y. E. R. Co.*, 125 N. Y. 164; 2 R. L. 1813, chap. 408, § 178.)

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v. *N. Y. Elevated R*
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**Ante*, page 252.

restrict its bearing to the rental damage. It appears to have been received generally without objection. According to our decision in the case last cited, it was not competent in relation to the fee damage. In estimating that, the evidence must be confined to what the railroad company is authorized to take, or interfere with, to wit, the easements of light, air and access.

At the close of the trial the defendants' counsel asked the trial judge to find the following matters, to wit:

"There is no easement or other interest appurtenant to the plaintiff's premises entitling him to be protected against loss of privacy due to the use of the street by passengers or other persons, if such use be authorized by the mayor, aldermen and commonalty of the city of New York, and the people of the state of New York."

"There is no easement or other interest in or over said Second avenue appurtenant to the premises of the plaintiff which would entitle him to the use of said Second avenue for the purpose of having the exterior of his premises conspicuously visible from the other side of the said Second avenue."

"There are no easements or other interests in or over said Second avenue appurtenant to said premises which would be impaired or infringed by the use of the elevated railway station and the approaches thereto by idlers or loafers, even though such might render the use and occupation of the said premises disagreeable, or result in money damages to the plaintiff."

"There is no easement or other interest in said street appurtenant to said premises which authorizes the owner thereof to control the amount of noise made in said street by the permission of the mayor, aldermen and commonalty of the city of New York and the people of the state of New York."

And the court refused so to find. It does not appear that the plaintiff's counsel claimed that his client owned such easements as were therein specified, nor did the trial judge find that he had such easements. The scope of them is uncertain. If it was meant by them that the judge should find that these

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l concur, GRAY, J., in result.
dgment affirmed.

J. MULLIGAN, Respondent, *v.* THE N
ROCKAWAY BEACH RAILWAY COMPANY,

a common carrier of passengers, by his contract
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the servant was acting at the time in the course
EL and FINCH, JJ., dissenting.)

Statement of case.

In an action to recover damages for an alleged unlawful arrest and imprisonment, the following facts appeared: Plaintiff, accompanied by a friend, purchased two passenger tickets of defendant's ticket agent, to whom he gave a five dollar bill and received the change with the tickets. A short time before a detective had left with said agent a circular describing three men who, it stated, were engaged in passing counterfeit five dollar bills; the detective told said agent to look out for these men, and if they appeared, to have them arrested. The agent took the bill of plaintiff, supposing him and his companion to be two of the men, and that the bill was counterfeit. After testing it, he sent word to a detective. In consequence of this, a police officer came; the agent, according to the plaintiff's testimony, pointed out the plaintiff, who was sitting at the time outside the station, and directed his arrest; he was thereupon arrested and brought into the ticket office. The agent charged him with having passed a counterfeit bill, which plaintiff denied, but gave the agent another bill in its place. He was then taken to the police court, and, upon examination, was discharged, the first bill having been found to be good. *Held* (EARL and FINCH, JJ., dissenting), that defendant was not liable; that the agent was not acting in the line of his duty so as to make his principal responsible for his acts; that he took the bill supposing it to be counterfeit, and so not in the course of his business, or in the discharge of his duties as agent, but to entrap plaintiff and to aid the police; and that he was not engaged in the discharge of any duty as agent when he pointed out plaintiff and directed his arrest; also, that defendant was not liable to plaintiff for any breach of its contract with him as a passenger, or for neglect of any duty growing out of the relation of passenger and carrier.

(Submitted December 7, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made May 11, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought to recover damages for an alleged unlawful arrest and imprisonment.

The facts, so far as material, are stated in the opinion.

E. B. Hinsdale for appellant. The defendant is not liable for the agent's mistaken view of his duty as a citizen. (Laws of 1888, chap. 583, §§ 20, 25; Code Crim. Pro. § 83; Penal Code, § 223.)

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ket and passed upon the defend
train, had become a passenger, an
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(*Carpenter* v. *B. & A. R. R.*
. *B. C. T. R. R. Co.*, 90 id. 588
'. S. R. 651; *Lynch* v. *M. E. R.*
v. *N. Y. & B. F. Co.*, 6 N. 1
it was acting within the scope of
arrest. (*Rounds* v. *D., L. & 1*
The arrest was unlawful. (Co
An objection taken after a witn
r any purpose, and an exception
useless on appeal. (*Parsons* v.
Co., 113 N. Y. 355; *Hangen* v.
Platner v. *Platner*, 78 id. 102.)
not excessive. (*McGibbon* v. *Yo*
h v. *M. E. R. R. Co.*, 90 N. Y.
. Supp. 132; 8 id. 855.)

The plaintiff recovered damag
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dark mustache. One 40 years, dark alapaca coat, black pants, slouch hat; the other 35 years, blue suit, black slouch hat, full red whiskers, looks like Italian." When the plaintiff and his companion came to the station the ticket agent supposed they were two of the parties described in the notice left with him by the detective. The agent's statement as to what took place between himself and the detective before the plaintiff appeared at the station and his action in consequence down to the time of the arrest is not contradicted. The agent was told by the detective that if any of these men referred to in the paper put in an appearance to have the officers arrest them. He says that the two men walked up to the window of the ticket office and the plaintiff took a brand new five dollar bill from his pocket and asked for two tickets for Rockaway Beach and return. What the agent then did is perhaps best expressed in his own language.

He says: "I took the money from him and gave him the two tickets; didn't let on anything at the time; took the bill and left it one side, because it looked 'queer.' After the two went outside a messenger boy came in; I took the bill up before the messenger came; took a pin and pulled to find the two parallel silk threads that run through the bill, it appears, in all these kind of bills that are made with the distributor fibre through, it is like a pencil mark, red and blue, and when I picked at it I could not see anything in it, and as I have no instructions to arrest anybody, I took the bill and when the messenger boy came in I told him to take the bill, go up to the Howard House and see if he could find Detective McNeany. If he did, to give him the bill and tell him that the men who had the bill were here at the station. I told him that if he didn't find him to give it to the ticket agent at the Howard House, the detective said something about giving him the bill and to ask him if that was the bill. I sent the bill away by this boy, the same bill that I received. Afterwards Officer Kenney and the messenger boy came in. The bill was not returned to me. I never had the bill after I gave it to the messenger boy."

It seems that in consequence of the action of th
the police arrived in a short time after the ticke
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He was arrested and brought to the police co
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by the plaintiff:

"I went in and handed him in a five dollar bill
agent, asked him for two return tickets for Ro
took the bill and looked at me; I thought that
young man that might have known me, he was go
going to make the change and give me the tickets;
back in the rear of the office, there was an operato
ting there; he had some conversation with her an
corner was a boy, in another corner of the roo
back to me and looked at me again, I says, you ou
a little more hurry than that, he didn't say a word
me out the change and my return tickets — the ch
five dollar bill, which I think was four thirty, or
was. Then we walked out on the platform, dc
Atlantic Avenue side and sat on the bench of the
form for ten or fifteen minutes, waiting for the train
It is a regular platform, I think there is a porch ov
not have to pass through a gate to go to it."

After the plaintiff was pointed out to the pc
agent, he was brought into the ticket office, and th
charged him with having passed to him a five dol
feit bill, which the plaintiff denied, but gave t
another bill in its place. The agent denied that h
direction to the police to make the arrest, and the
question on the trial as to whether the bill that
passed by the plaintiff was the bill produced befo
magistrate, and found by him to be good, but the
must be regarded as settled in the plaintiff's favor
dict of the jury.

Assuming, as we must, that the agent directed the arrest, and that the plaintiff had committed no offense that justified it, the question still remains whether the agent was acting in the line of his duty, so as to make the defendant responsible for his acts. It is quite clear from the evidence that the agent was first put upon his guard and in fact set in motion, not by any direction from the defendant, but by the police. When he took the bill he knew, or at least believed it to be a counterfeit, but notwithstanding this, he gave the plaintiff defendant's property for it, whereas it was his duty, considering him merely as the agent of the defendant, to refuse it. He did not take the bill in the course of his business as agent, but for the purpose of entrapping persons that he believed to be engaged in the commission of crime. This may have been laudable enough on his part as a citizen, or as a person aiding the police, but he was not acting in the line of his duty as defendant's agent. If he had been cheated or imposed upon by the plaintiff, or if he honestly believed he had been, and then attempted to recover what he had, or supposed he had, lost by the arrest of the plaintiff, it might then be said that he was engaged in the protection of the property and interest of the defendant, and, therefore, acting within the line of his duty. But here a ticket agent of a railroad deliberately takes from a person, applying to purchase a ticket, what he believes to be a counterfeit five dollar bill, not, of course, in good faith, or in the regular and ordinary course of his business, but for the purpose of aiding the police in the detection of criminals, and then immediately directs the arrest of the person from whom he took the bill, such an act on his part is not binding on his principal. If he was in fact acting within the scope, and in the line, of his duty, he would have refused to receive what he believed to be counterfeit money for the property of his principal, and would have refused to part with such property, except upon receipt of what, at least, he believed to be good money. The defendant, as a citizen, might with perfect propriety render to the police such services as he could in procuring the detection and arrest of persons engaged in passing

terfeit money, but it does not follow
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er owes to him. (*Stewart* v. *B. & C. R. R. Co.*, 90 1
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on the facts disclosed by the record, it is very difficult
this case within that principle. All we know wi
ct to the duties of the agent is that he sold tickets at t
n from a place behind a window in the waiting-roo
es not appear that he had any charge of the place whe
plaintiff was when arrested, or that the plaintiff w
n the meaning of the decisions, in his custody or und
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dant with any powers or duties with respect to the ex
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the facts disclosed at the trial, it would be quite difficu
t impossible, to classify the act of the agent, in pointi
he plaintiff to the police and directing his arrest, as neg
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in his charge and under his care, may violate the du
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which his principal may be held liable, but sufficie
not shown in this case to bring it within that rule.
e judgment should be reversed and a new trial grante
to abide the event.

Dissenting opinion, per EARL, J.

EARL, J. (dissenting). The plaintiff purchased of the defendant's agent at East New York two tickets for himself and friend to Rockaway Beach and back, over its railway, and immediately passed out of the depot building on to the platform outside, where he took a seat, under an awning, upon a bench provided for passengers who were awaiting trains. By the purchase of these tickets the relation of carrier and passenger was created between him and it, its agreement implied from the facts being that it would, upon its first train stopping at that station, carry him to his destination. The train was soon expected, and while he was there waiting for it he was entitled to a safe place to stand or sit, and it was under obligation to him that he should not be injured by the careless or willful misconduct of any of its employes or agents. (*Carpenter* v. *Boston & Albany R. R. Co.*, 97 N. Y. 494.) In that case, after the plaintiff had purchased his ticket for a passage on the defendant's road, and while he was standing on the platform at the depot, a postal clerk threw a mail bag from the train, which struck and injured him; and DANFORTH, J., writing the opinion, said: "The plaintiff was injured before the actual commencement of his journey, but he was lawfully on the platform because he was a passenger;" and it was held that it is the duty of a railroad corporation to provide for a passenger a safe passage to the train he desires to take, and to take reasonable care that he shall not while on its premises be exposed to any unnecessary danger, or to one of which it is aware; that it is bound to exercise the utmost vigilance, not only in guarding its passengers against careless interference by others, but even against violence, and if in consequence of neglecting this duty a passenger receives injury which, in view of all the circumstances, might have been reasonably anticipated, it is liable.

No one will question that if the plaintiff, while sitting upon the bench waiting for the train, had been injured by the carelessness of one of the defendant's employes, it would have been liable; and it is now well settled that where a railroad company would be liable for the careless act of its employe, it would also be liable for his willful or malicious act, causing

injury to a passenger whom it was bound to k
safely. In *White* v. *23d St. R. R. Co.* (20 N.
510), it was held that if a passenger on a st
ejected from the car and assaulted by the dr
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for causing the arrest of the passenger. In *H*
& B. Ferry Co. (6 N. Y. Sup. 102, affirmed in
N. Y. 707), the action was for assault and bat
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authority, called in a police officer and had the pl
defendant was liable, and that it was immater
authorized the arrest or not. In *Stewart* v.
Crosstown R. R. Co. (90 N. Y. 588), where th
a passenger on one of the defendant's street
unjustifiably assaulted and beaten by the driver,
an action to recover damages therefor, that it v
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inflicted by his servant, when not acting wi
of his employment, does not apply as betwe
carrier of passengers and a passenger; that
undertakes to protect the passenger against any
from the negligence or willful misconduct of its
engaged in performing a duty which the carrier
senger. In that case Judge TRACY writing the
court cited many authorities; and among oth
"In the present case the defendant had intru
tion of the contract to the driver of the car, a
was under his protection. Any breach of th
mitted by the driver, was a breach committed by
It is conceded that any injury arising from the n
of the servant constitutes a breach of the cont
driver while executing the contract, carelessly
injured the plaintiff, the defendant's liability v

been doubted. Can it be less a breach of the contract that the injury was intentionally inflicted? An act which would amount to a breach of the carrier's contract, if negligently done, would be equally a breach if done willfully and maliciously. It is immaterial whether a breach of contract results from negligence or willfulness of the defendant's agent. It is the injury that was suffered by the plaintiff while in the defendant's car, and not the motive which induced it, that constitutes the gist of the action. No reason exists for holding a master liable for the negligence of servants in his employment which does not with equal force preclude him from alleging intentional default of the servant as an excuse for not performing a duty which he has undertaken. In the former case the negligence of the servant is that of the master, and that is the ground of the master's liability; in the latter the act of the servant is the act of the master, the motive of the servant making no difference in regard to the legal character of the master's default in doing his duty, * * *. A rule which should make the carrier liable when the act resulting in the injury was carelessly, but unintentionally done, and exonerate him when the injury was the result of the intentional act of the servant, would lead to most absurd results." In *Dwinelle* v. *N. Y. C. & H. R. R. Co.*, (120 N. Y. 122,) it was held that a railroad company by the sale of a ticket for passage on its road, assumes the obligation, and undertakes absolutely to protect the passenger against any injury from negligence or willful misconduct of its servants while performing its contract; and that whatever may be the motive which incites the servant to commit an unlawful or improper act towards the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act and its natural and legitimate consequences. In such a case, too, it has been held that it is wholly immaterial upon the question of the defendant's liability that the servants acted in good faith. (*Hamilton* v. *T. A. R. R. Co.*, 53 N. Y. 25.)

In this case the relation of carrier and passenger having been created by the purchase of the tickets, the plaintiff was just

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Statement of case.

If the plaintiff had been a mere lounger in or about the defendant's depot, having no relations with it — not a passenger — different rules of law would apply, and it may well be that upon the facts as they appear, it would not have been liable for the assault upon him and his arrest. Its liability to him grows out of the fact that he was a passenger entitled to its protection.

No question was made upon the trial as to the extent of the ticket agent's authority. It was there assumed that he was the agent having the charge of the depot at East New York. It does not appear that there was any other agent at that point. He is spoken of in the evidence as *the* agent. The general superintendent of the defendant's road testified that he was "the agent" of the defendant at East New York, and in the motion by the defendant's counsel for a nonsuit, he was spoken of as "the agent" of the defendant. The judge, in his charge to the jury, spoke of him as "the ticket agent in charge of this station," and no exception whatever was taken to this remark, and no claim whatever was there made by the defendant that he was not its agent in charge of that depot.

We, therefore, see no reason to doubt that the judgment in favor of the plaintiff is right, and should be affirmed, with costs.

All concur with O'BRIEN, J., except EARL, J., who reads dissenting opinion, and FINCH, J., concurring.

Judgment reversed.

SILAS L. GRIFFETH, Appellant, *v.* ANDREW H. GREEN et al., Respondents. 129 517 151 65

The liability imposed by the General Manufacturing Act (§ 10, chap. 40, Laws of 1848) upon stockholders of a company organized thereunder, for a failure to file the proper certificate of payment, upon an increase of its capital stock, attaches only to the increase, and only stockholders holding the increased stock are liable; the provision has no reference to, or effect upon, the original capital and its holders.

Statement of case.

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521; *Willard* v. *Sp*
ay, 9 Wend. 317; *Ro*
t v. *Huntingdon*, 2

Fowler v. *Bowery Sav. Bank*, 113 N. Y. 450.) The fact that the defendants' testator, W. B. Ogden, was at one time a trustee of the Millerton Iron Company, does not in any way affect this action. (*Brackett* v. *Griswold*, 103 N. Y. 425; *Stokes* v. *Stickney*, 96 id. 323; *Wiles* v. *Suydam*, 64 id. 173.)

GRAY, J. The plaintiff was a judgment creditor of the Millerton Iron Company, a domestic corporation organized under the General Manufacturing Act of 1848, and, failing to obtain satisfaction by execution upon his judgment, commenced this action to enforce against the defendants, as stockholders, the liability imposed by the statute upon such for the failure to file the proper certificate of payment upon an increase of the capital stock. The defendants were executors of William B. Ogden, deceased, who, in his life-time, had been the holder of 223½ shares of the company's capital stock. It is not disputed that the original stock and a first increase of the capital were fully paid up, and the required certificates of the fact duly filed, nor that upon subsequent issues of increased capital stock such certificates were either defective or wanting. It also did appear that the whole capital as increased had, as matter of fact, been paid in. The question is whether the plaintiff made out a case sufficient to charge the defendants with any statutory liability for such subsequent defaults to comply with the statute, and is purely technical.

Looking at the allegations of the complaint, in the first place, we find that it sets out the several promissory notes made by the company and delivered to the plaintiff; their non-payment at maturity; the recovery of judgment thereupon and the return of execution unsatisfied; the several increases of capital stock and the failure to make and record certificates of the payment of the capital stock, as prescribed by sections 10 and 11 of the act, except as to the first increase of stock.

The allegations as to the testator's holding of stock are that he "was the owner of some of the original stock of said company, and continued to sell and purchase shares of stock up to the time of his death, * * * at which time he was the

23½ shares, etc.;" and it is alleged tha
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stockholders, holding the said 223½
leged that the testator, or his exe
held any of the issues of increased s
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the argument, and the statute never intended that the consequences of a failure to file the required certificate of payment upon an increase of the capital stock should be visited upon any but those who held it. In the case of *Veeder* v. *Mudgett* (95 N. Y. 295), the question of the liability, which the statute imposes for the failure to file a proper certificate upon an increase of the capital stock, was fully considered. It was held that such a liability attached only to those who held of the increased capital, and that it has no reference to, and no effect upon, the original capital and its holders. Judge FINCH, who delivered the opinion there, summarized by saying that "it is the *increase* which is subjected to the liabilities of the act, and, as a consequence, only the holders of that increase to the par value of that stock who are liable for debts. The innocent holder of full paid stock, once discharged by law, because his duty was done, goes free, as he should."

It is not possible to see why the decision in that case should not control here. It, obviously, is authority for the proposition that the burden is upon him, who seeks to enforce this statutory liability, to allege and to prove that the conditions of the statute are exactly met by the case. The principle is unquestionably right, and it is one which underlies all cases where a liability is sought to be imposed, which is in derogation of the common law, and arises solely by reason of some legislative enactment. The statute here must be read with some respect to the object in view, and it is then apparent that strictness harmonizes with reasonableness of construction. The provisions, with which we are now concerned, were intended as a protection to those who have dealings with the corporation. They justify them in relying upon the fact that the whole authorized capital has been paid in, in time and manner as prescribed by the statute, and if that fact is not certified to in the way there pointed out, then the holders of stock, as to which a certificate of full payment has not been filed, are made severally liable to the creditors of the company.

The requirements of the law, as to the payment of the company's capital, and as to the filing of a certain certificate, are

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Statement of case.

FRANK LESLIE, Respondent, *v.* GEORGE F. BASSETT et al., Appellants.

Negotiable paper, transferred as security for or in nominal payment of interest to accrue upon an antecedent debt, is subject to all the equities existing between the original parties to it and to any defenses which would have been available to the maker had the paper not been transferred.

Where, therefore, there was a good consideration for a draft when it was accepted, but subsequently such consideration entirely failed, *held*, that the failure of consideration was a good defense to any action upon the paper brought by the transferee.

The American Exchange, a banking corporation, in pursuance of an agreement with B. & Co. accepted a draft drawn by A. & Co. for the amount of goods purchased of that firm by B. & Co., to which was attached a bill of lading of the goods, running in the name of B. & Co., and to reimburse it drew upon the latter firm for the same amount, with commissions added, payable before the maturity of the draft drawn by A. & Co. Said draft was accepted by B. & Co., and was transferred to plaintiff, who had loaned money to the Exchange as a security for or a conditional payment of interest to accrue upon her loan. Within two days thereafter the Exchange became insolvent and A. & Co.'s draft was never paid. In an action against B. & Co. upon their acceptance, *held*, that plaintiff was not a *bona fide* holder for value; that the consideration having failed the Exchange could not enforce the draft, nor could the plaintiff, who succeeded to its rights, and so, that the action was not maintainable.

(Argued December 9, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 5, 1891, which overruled defendants' exceptions ordered to be heard in the first instance at General Term and directed judgment in favor of plaintiff upon a verdict.

The action was brought to recover the amount of a draft drawn by the American Exchange in Europe (Limited), a banking corporation, upon and accepted by the defendants and indorsed and transferred by the drawer to the plaintiff.

The Exchange, by an agreement made with George F. Bassett & Co., the defendants herein, that it would accept drafts drawn upon it by Alcock & Co. for the amount

Statement of case.

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495; 1 Daniels on Neg. Inst. [3d ed.] 773; *Bay* v. *Coddington*, 2 Johns. Ch. 637.)

ANDREWS, J. According to the settled law of this state, as established in *Coddington* v. *Bay* (20 Johns. 637), and reaffirmed in subsequent cases, the plaintiff having taken the draft as security for or in nominal payment of interest to accrue on an antecedent debt, it was subject in her hands to any defenses which would have been available to the defendants in case the draft had not been transferred and the action had been brought by the drawees against the defendants as acceptors. The plaintiff on receiving the draft surrendered no securities, extinguished no liability for the principal or interest of her debt against the Exchange, and the most favorable construction of the transaction in her behalf is that she received the draft as conditional payment of the interest to accrue on the loan. It cannot be doubted that in case the draft was not paid, she would have recourse on her original obligation against the Exchange to recover the interest for which the draft was taken in nominal payment. (See *Phœnix Ins. Co.* v. *Church*, 81 N. Y. 218, and cases cited.)

The plaintiff stands upon the right of the Exchange, and the right of the latter to recover if it still held the draft and had brought the action, is, in this case, a test of the plaintiff's rights. The real consideration of the draft in suit was the obligation assumed by the Exchange to accept and pay the drafts of Alcock & Co., drawn upon it for goods purchased by Bassett & Co. from Alcock & Co., Bassett & Co. desired credit for purchases to be made by the firm from Alcock & Co. The Exchange agreed with Bassett & Co. to accept the drafts of Alcock & Co. upon its London house, at ninety days, drawn for goods sold by Alcock & Co. to Bassett & Co., of New York. In order to put the Exchange in funds to meet its acceptances of the drafts of Alcock & Co., Bassett & Co. agreed to accept drafts drawn by the Exchange upon Bassett & Co. for equivalent amounts payable in New York, to mature twenty days before the drafts which it should accept drawn by

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Statement of case.

successor could maintain an action on the draft, and that the plaintiff as transferee is in no better position. We deem it unnecessary to consider whether the transfer of the draft to apply upon an antecede t debt of the plaintiff against the Exchange, was a wr gful diversion of the draft from the purpose for which 't was to be used. It is sufficient that the consideration has failed and this constitutes a good defense to the action.

The court, therefore, erred in directing a verdict for the plaintiff and for this error there should be a reversal of the judgment.

All concur.

Judgment reversed.

JOSIAH J. WHITE, Respondent, *v.* GEORGE C. WOOD et al., Appellants.

129 527
142 656

Upon foreclosure of a mortgage executed by the C. R. Co., a Kentucky railroad corporation, to secure its bonds which, to the amount of $994,000 were then outstanding, the property was bid in by defendants under an agreement which provided that they should purchase as trustees, for the benefit of the bondholders, who in pursuance of the agreement had deposited their bonds with a trust company, receiving receipts therefor. In case defendants should fail to sell they were authorized to organize a new corporation, in which event the stock of the new corporation was to be issued to and divided among the holders of the receipts, "in proportion to the number of bonds deposited, for which the receipts were issued, upon the surrender * * * of such receipts." The agreement also provided that defendants "shall have full power and authority to make due provisions, in their discretion, in case of any defect of their express powers, and shall, nevertheless, proceed to carry out the true intent, meaning and purpose of the agreement by conforming as near as may be to the provisions thereof." Also, that "they shall determine all questions that may arise concerning the construction and effect of any provisions" of the agreement, and that their "determination shall be final and conclusive." Having failed to sell within the time designated defendants filed articles of incorporation, which fixed the capital stock of the new corporation at the same amount as the stock of the old company, *i. e.*, $2,000,000; of this amount $994,000 was to be issued to the holders of the receipts in consideration of the conveyance

Statement of cas

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Opinion of the Court, per O'BRIEN, J.

Wheeler H. Peckham for appellant. The General Term erred in holding that the acts of defendants in organizing the new company with a provision in the articles that the capital stock should be $2,000,000, and that but $994,000 thereof should be issued to the old bondholders, was unauthorized by the trust agreement and a breach of trust, irrespective of the question of good faith. (*Shaw* v. *R. R. Co.*, 100 U. S. 611; *People* v. *Colman*, 126 N. Y. 433; *Williams* v. *W. U. T. Co.*, 93 id. 188; *Hollister* v. *Stewart*, 111 id. 664.) The plaintiff alleges and shows no damage. (*Johnson* v. *Morgan*, 68 N. Y. 494.)

William J. Gaynor for respondent.

O'BRIEN, J. The judgment in this case is based upon acts of the defendants, claimed to be in violation of their duty as trustees, and done in bad faith. The Chatteroi Railway Company, a Kentucky coporation owning a railroad in that state, had issued one thousand bonds of $1,000 each, secured by two several mortgages to the Union Trust Company of New York. There were nine hundred and ninety-four of these bonds outstanding when the company made default in the conditions of the mortgage, and it was foreclosed by suit in the United States Circuit Court in Kentucky, and the road and its equipment sold, and purchased by the defendants for the benefit of the bondholders. The defendants, in making the purchase, acted under the terms of a written agreement between themselves and the holders of the bonds, bearing date February 15, 1887. This agreement provided, among other things, that the bondholders should deposit them with the trust company, subject to the order of the defendants, for use in the purchase of the property, and should receive therefor the receipts of the trust company. The bonds were so deposited, the receipts given and used in the purchase of the property at the foreclosure sale. The agreement between the defendants and the bondholders, which prescribes at length and in specific terms the powers and duties of the defendants as the purchasing com-

mittee and trustees for the bondholders, also provided that, in case the defendants purchased the mortgaged property, they might sell the same, within a fixed time, at a price named, which was to be deposited with the trust company for the benefit of the bondholders, and that the defendants should operate the road until the sale could be made, or a new corporation organized to take and operate the road. The defendants were authorized to organize a new corporation in case they failed to sell the road, and in that event it was provided that: "The stock of such company shall be issued to and divided among the holders of the receipts issued by the trust company hereunder, in proportion to the number of bonds deposited, for which the receipts were issued, upon the surrender to the said trust company of such receipts." The defendants did organize a new company, under the laws of Kentucky, but did not deliver the whole authorized capital stock to the bondholders, and in this respect, it is claimed, they failed to perform their duty as trustees under the agreement. There are some other clauses of the agreement, following the one above quoted, which must be read with it in order to get a clearer idea of the question. It was provided that the defendants "shall have full power and authority to make due provisions, in their discretion, in case of any defect of their express powers hereunder, and shall, nevertheless, proceed to carry out the true intent, meaning and purpose of this agreement by conforming, as near as may be, to the provisions thereof," and further, "They shall determine all questions that may arise concerning the construction and effect of any provision of this agreement, which determination shall be final and conclusive in every case."

The defendants having failed to sell the railroad within the time designated, filed articles of incorporation in the proper county clerk's office in Kentucky, but did not make publication of the same as required by the laws of that state in order to create a corporation, and in fact, within a month after such filing, notified the clerk that the articles were abandoned, and new articles were filed August 23, 1889.

Opinion of the Court, per O'BRIEN, J.

Under the articles first filed, the capital stock was to be $2,000,000, subject to be increased by a majority of the stockholders to any sum necessary to complete and equip the road, not exceeding $10,000,000. An amount not exceeding $2,000,000 of the stock was to be issued as paid-up capital stock, in exchange for the trust company receipts issued upon deposit of bonds by the holders. By the articles of incorporation last filed, and under which the new corporation was created, the capital stock was also fixed at $2,000,000, and the only material difference in the provisions of the two articles, in so far as concerns this case, was in the clauses providing for the issue of the capital stock. The articles first filed provided for the immediate issue and distribution among the holders of the trust company receipts, representing the surrendered bonds, of not exceeding $2,000,000 of stock, in consideration of the conveyance to the company to be organized thereunder, of the mortgaged property by the defendants, while in the articles filed subsequently, but nine hundred and ninety-four thousand dollars of stock was to be issued and delivered to the holders of the receipts in consideration of the conveyance by defendants of the property purchased at the foreclosure, and the residue of the stock might "be disposed of from time to time by the board of directors at its discretion, and is to be paid in from time to time upon calls by the board of directors." The organization of the new company having been thus completed, under their charter the defendants conveyed to it the property purchased by them at the foreclosure sale by a deed dated August 20, 1889, acknowledged by the grantor on the same day, and by the grantee August 24, 1889, and on this latter date delivered to the grantee. It was recorded in two counties of Kentucky. In one of them, August 30, 1889, and in the other, September 2, 1889, and this action was commenced August 26, 1889. The plaintiff was the owner of twenty-seven of the bonds secured by the mortgage, under foreclosure of which the defendants, as trustees for him and the other bondholders, acquired the road, and those bonds he surrendered as provided for by the trust agreement, and took in their

place the trust company receipts, and was, therefore, entitled to his equitable proportion of the capital stock of the new company. He brought this action to restrain the transfer of the road to the new company by the defendants. On the trial, the only evidence given by the plaintiff was the trust company receipts, which showed his interest in the subject-matter of the controversy. The judgment, among other things, restrains the defendants from collecting a note given to them by the new company for $56,800. With reference to this note, the allegation of the complaint is that it was given to the defendants by one Collis P. Huntington upon an agreement with him, whereby the defendants, in violation of their trust duty, and for the purpose of benefiting themselves personally, agreed to procure for him, in consideration of said note, a majority in value of the bonds at fifty per cent par value, and, thereupon, turn the new corporation over to him. The finding of the trial court is that the note was given to defendants by the new corporation "as part and parcel of the attempt of the defendants to so transfer the said franchise and property to the said new incorporation in violation of their said trust." There seems to be no conflict in the evidence in regard to the consideration of the note, and that is to the effect that it was given to the defendants by the new corporation for the purpose of repaying advances made by the defendants for actual expenses of the committee in the performance of the trust and one or two items of estimated expenses, and, after paying these, the surplus, if any, represented by the note, was to be paid back to the corporation that made it. Nor is there any dispute as to the fact that the deed by defendants, of the property to the new corporation, was actually delivered to it before the suit was commenced. This is conceded in the opinion at General Term. The judgment, therefore, enjoined the defendants from doing what had already been done; and, aside from the feature which impounds the note, in which the plaintiff has no interest whatever, the only effect that the judgment can have is possibly to enjoin the issue of the stock over and above the nine hundred and ninety-

four thousand dollars, and as neither the new railroad corporation nor any of its directors are parties to this action, it is difficult to see how it accomplishes even that. There does not seem to be any basis upon which that part of the judgment enjoining the transfer and the payment of the note can rest. But the more important question in the case is whether it has been shown that the defendants actually committed any breach of duty as trustees, or in any material respect violated the trust agreement to the plaintiff's damage. It is not found or claimed that the mere filing of the first articles of incorporation, in July, 1889, had the effect of bringing any new corporation into existence. It seems that, under the laws of the state where they were filed, no such result followed. Something more remained to be done before a corporate entity was created, which was not done, and the attempt to create a corporation by this filing was abandoned and new papers filed in their place, which, it seems, resulted in the creation of the new corporation, which the defendants are enjoined from conveying to.

The plaintiff, evidently, would not deem himself aggrieved at all had the defendant proceeded under the articles first filed. Then he would have his share of two millions of stock; now he has only his share of nine hundred and ninety-four thousand dollars of stock. But although the stock in the first case would, on paper, express a larger interest in shares in the new road than that issued under the last articles, yet, in both cases, the actual property to be represented by the stock to be issued to the bondholders was precisely the same. When the bondholders of the old road became stockholders in the new one, they were to have their *pro rata* interest in the road which the defendants purchased for them and no more. No matter at what sum the new road was capitalized whether at two millions or nine hundred and ninety-four thousand dollars, what the plaintiff was entitled to was the same proportion of the stock issued to represent the property purchased by the defendants as his twenty-seven bonds bore to the whole amount of the bonds secured by the mortgage foreclosed. Had the

capital stock of the new corporation been fixed at the value of the property purchased by the defendants then all the shares would go to the bondholders. In executing that part of the trust which provided for the organization of a new corporation, to operate the road, the defendants were required to proceed according to the laws of the state in which the property was and under which the corporation was to be created. The express powers conferred on defendants by the trust agreement were general and all the details necessary to be considered, when a new corporation was to be brought into existence, were not specified, but, notwithstanding this, the defendants were to go on and "carry out the true intent, meaning and purpose of this agreement by conforming as near as may be to the provisions thereof." The precise question then is whether the defendants, as trustees, disregarded the agreement and violated their duty, when organizing the new corporation, in providing for the issue to the bondholders of only nine hundred and ninety-four thousand dollars of stock instead of two millions. The agreement required the defendants to issue to the bondholders the stock of the new company. But what did the parties mean by these terms? Clearly the stock of the new company, within the contemplation of the parties, was nothing else than the old road or in other words the property purchased at the foreclosure sale by the defendants. There was no other property in which the bondholders were jointly interested or which could be divided and distributed to them. Now the defendants in proceeding to discharge the duty of organizing a new corporation were bound, under the laws of Kentucky, to provide in the articles for the amount of capital stock authorized and the time when and the conditions upon which it was to be paid. The laws of that state authorizing the purchasers of railroads, at foreclosure sale, to become incorporated authorized the corporators to provide in the articles for the issue of paid-up capital stock not to exceed "the original cost of the construction of the railroad and equipment purchased, and such sum as may be necessary to complete the same." Now the paid-up capital stock, which the bond-

holders were entitled to receive, could not exceed the original cost of the road purchased with its equipments. The defendants bid in the property at $750,000. In the articles they fixed its cost or value at the amount of the original bonds, namely $994,000, and provided for the issue to the bondholders of paid-up stock to that amount, in proportion to their original interest as represented by the receipts of the trust company. Had they intentionally fixed the amount of paid-up capital stock to be issued to the bondholders, at less than the value of the property purchased, then the plaintiff would have a right to complain, but it is not suggested that the defendants did that, but the new articles provided, not only for the operation of the road, but also, in conformity with the laws of Kentucky, for the completion of it. This could not be done without more capital and so the articles provided that other stock, up to two million dollars, might be issued by the board of directors and sold for money or other proper consideration. The bondholders were not entitled to this stock unless they paid for it. The defendants fixed the capital of the new road at just what the capital of the old one was and they fixed that part of it which was to be considered paid up, by the purchased property, at the amount of the bonds used in its purchase and they say that they have the plaintiff's proportion of that paid-up stock to give to him whenever he will take it. That all the other holders of bonds for whose benefit the defendants purchased the property have taken the stock and ratified the defendants' acts. When we consider the broad powers, contained in the trust agreement, conferred upon the defendants, to some of which we have referred, and the laws of the state under which the defendants were to act, we think they are not liable, providing that they acted in good faith. If the provision in the articles incorporating the new railroad, for the issue to the bondholders of paid-up stock to the extent of nine hundred and ninety-four thousand dollars, was the result of an honest construction of their powers, under the laws of the state where the corporation was to be created, it would be unjust to hold them liable upon some narrow or technical con-

struction of the agreement or the meaning of the law that they were obliged to act under. (*Shaw* v. *Railroad Co.*, 100 U. S. 605; *Hollister* v. *Stewart*, 111 N. Y. 644.)

The complaint alleges and the trial court found that they did not act in good faith but on the contrary acted in bad faith, and to this finding the defendant excepted. We have carefully examined the record and are unable to find any evidence in it to uphold the finding and we are referred to none by the plaintiff's counsel. He stated on the trial that he relied on the case made by the pleadings, but they nowhere contain any admission of bad faith, on the part of the defendants. On the contrary they gave evidence at the trial that they acted in good faith.

The judgment should, therefore, be reversed and a new trial granted, costs to abide the event.

All concur, except Peckham J., not voting.

Judgment reversed.

Frederick Booss et al., Respondents, *v.* Margaret A. Marion et al., Appellants.

129 536
147 593

Where an assignment for the benefit of creditors, executed by the members of a firm, by its terms assigned all the partnership property and the individual estate of each of the assignors, and, after preferring certain firm creditors, directed the assignee with the residue to pay in full all other debts and liabilities of the assignors, "together or respectively," and if the residue was insufficient, to apply it toward such payment "ratably and in proportion," and it appeared that there were individual debts, *held*, that the assignment was upon its face fraudulent and void as to firm creditors, as its effect was in one contingency to devote part of the partnership property to the payment of individual debts of the assignors before payment in full of all the partnership debts; also that it was not validated by the fact that the assets were insufficient to pay the preferred debts.

(Argued December 9, 1891; decided January 20, 1892.)

Appeal from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order

made the first Tuesday of January, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiffs as judgment creditors of the firm of Marion & Co., to set aside, as fraudulent and void, an assignment for the benefit of creditors, executed by the defendants, Margaret A. and James Marion, who composed said firm, to the defendant John F. Kinney.

The assignment, by its terms, grants and assigns all the copartnership and individual estate, property and effects of every description belonging to the parties of the first part, or either of them. After providing for the payment of the expenses of executing the trust, and of wages due to employes, it directs the assignee to pay certain preferred debts, most of which appear on the face of the provision to be debts of the copartnership; the four last items are as follows: "And to J. Fahy & Co. and James G. Comerford of Rochester, N. Y., the amount of their accounts; and also to A. J. Kirley the sum of $70, and to R. G. Dun & Co. the sum of $50." Then follows a direction to the assignee in these terms: "4th. To pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the parties of the first part, together or respectively, with all interest moneys due or to grow due; and, if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities, ratably and in proportion." The court found the assignment correctly set out in the complaint; that the debts preferred to Fahy & Co. and Comerford were fictitious, being made to appear by an alteration of the books of the firm, whereby an individual indebtedness of Margaret A. Marion, of between $700 and $800 to each of said pretended creditors of the firm, was credited to each of them, respectively, and charged to Margaret A. Marion, with the result that what were, in fact, individual debts of Margaret A. Marion to the creditors named became apparent

Statement of case.

debts of the firm to them, and were preferred as such; that such alteration of the books of the firm was made at about the time the assignment was made, without the knowledge of either of the copartners, by one Francis E. Marion, the husband of Margaret A., who was general manager, and had sole charge of the business of the firm, that such fictitious preferences were supposed by the assignors to be actually correct when the schedules were made in which the several amounts of those preferences were specified. The court further finds: "8th. That in said assignment the said assignee was directed, after the payment of the preferred creditors, to devote the remainder of the proceeds, or so much thereof as might be necessary, to the payment of the debts of said firm of Marion & Co., and the individual debts of Margaret A. Marion and James Marion, ratably, and share and share alike; and that said payments were to be made out of the proceeds of the sale of the individual and firm property without discrimination. That the individual debts of Margaret A. Marion amounted to several hundred dollars." And as a conclusion of law, the court finds that the assignment is fraudulent and void as to the plaintiffs and such other judgment creditors as may come in.

Edward F. Wellington for appellants. The complaint charged only that the assignment was made with intent to hinder, delay and defraud creditors, and the judgment cannot be sustained upon findings which negatived the allegations of the bill and made out a new and unsuggested case. (*Day* v. *Town of New Lots*, 107 N. Y. 154, 155; *Wright* v. *Delafield*, 25 id. 266; *Salisbury* v. *Howe*, 87 id. 132, 133; *Ferguson* v. *M. L. Ins. Co.*, 22 Hun, 326; *Baird* v. *Mayor, etc.*, 96 N. Y. 603.) If the assignment was fraudulent and void *per se*, it was so on account of the grammatical construction given to the assignment itself by the courts below, and the appellants insist that such interpretation is forced and wrong. (*Crook* v. *Rindskopf*, 105 N. Y. 485; *Townsend* v. *Stearns*, 32 id. 209; *E. S. Bank* v. *Roche*, 93 id. 378; *Platt* v. *Lott*, 17 id. 480; *Kellogg* v. *Slauson*, 11 id. 305.) The judgment is wrong, for

the reason that the plaintiffs did not rest upon the document, but went on into the question of actual fraudulent intent to make the debts of Margaret debts of her firm. From that moment the question of construction became subordinate and the plaintiffs could only succeed upon the issue of actual fraud, and the court has found the defendants innocent. (*Crook* v. *Rindskopf*, 105 N. Y. 481; *Jaycox* v. *Turner*, 40 id. 475; *Hurlbut* v. *Dean*, 2 Keyes, 97.) It is no objection to the validity of this assignment that it preferred over other partnership debts these debts of Margaret A. Marion, not originally contracted by the firm, but which they had assumed and become liable to pay. (*Turner* v. *Jaycox*, 40 N. Y. 475; *Wilson* v. *Robertson*, 21 id. 572; *Bernheimer* v. *Rindskopf*, 116 id. 439.) Assuming that Frank Marion changed the books with some meretricious intent of his own in which his employers had no part, the question comes squarely before this court, whether an honest assignment will be set aside because some third person, upon whom the assignors of necessity relied for their information, misled them. (*Hardman* v. *Bowen*, 39 N. Y. 200; *Shultz* v. *Hoagland*, 85 id. 468; *Warner* v. *Jaffray*, 96 id. 253.) The act of Frank Marion, at the worst, was merely a fraud upon the assignment, and could not avoid the instrument. The assignee could have maintained an action to set aside the Fahy and Commerford transactions in aid of the trust. If he had refused, these creditors might have maintained it. But this action to set aside the assignment itself cannot be upheld upon the facts which exist. (*Loos* v. *Wilkinson*, 110 N. Y 198, 200, 210; *Spring* v. *Short*, 90 id. 545; *Crouse* v. *Frothingham*, 97 id. 112; Laws of 1858, chap. 314; *Southard* v. *Benner*, 72 N. Y. 424.)

David N. Salisbury for respondents. The allegations of the complaint are sufficient. (3 R. S. 23–29, §§ 1–4; *Durant* v. *Pierson*, 29 N. Y. S. R. 510; *Wilson* v. *Robertson*, 21 N. Y. 587; *Hulbert* v. *Dean*, 2 Keyes, 97.) If there is any evidence to support the findings of fact excepted to, they, as well

as those not excepted to, are binding and conclusive upon this court. (*Quincy* v. *White*, 63 N. Y. 370; *Barker* v. *White*, 58 id. 204; *Stillwell* v. *M. L. Ins. Co.*, 72 id. 385.) The preferred claim in favor of J. Fahy & Co. was fictitious. (3 R. S. [7th ed.] 2276, § 3; *Terry* v. *Butler*, 43 Barb. 395; *Talcott* v. *Hess*, 31 Hun, 282–284; *Shultz* v. *Hoagland*, 85 N. Y. 464, 468; *Menagh* v. *Whitwell*, 52 id. 146; *Ransom* v. *Van Deventer*, 41 Barb. 307; *Victor* v. *Henlein*, 34 Hun, 562.) The directions to pay Commerford and Fahy & Co. each a sum exceeding the amount due them rendered the assignment fraudulent and void. (*De Camp* v. *Marshall*, 2 Abb. [N. S.] 373; *Tieden* v. *Day*, 2 Sandf. 594; *Meade* v. *Phillips*, 1 Sand. C. N. 83; *Frazier* v. *Truax*, 27 Hun. 587; *Talcott* v. *Hess*, 31 id. 232; *A. E. Bank* v. *Webb*, 36 Barb. 29.) The assignment provided for the payment of the individual debts of each member of the firm from copartnership property, and the debts of each individual member of the firm out of the proceeds of the individual property of the other member of the firm, and is, therefore, upon its face fraudulent and void. (*Platt* v. *Hunter*, 11 Wkly. Dig. 300; *Willson* v. *Robertson*, 21 N. Y. 587; *Shiel* v. *Healey*, 61 How. Pr. 73; *O'Neil* v. *Salmon*, 25 id. 246; *National Bank* v. *Cohen*, 6 N. Y. S. R. 380; *Hulbert* v. *Dean*, 2 Keyes, 97–99; 2 Abb. Ct. App. Dec. 428; *Menagh* v. *Whitwell*, 52 N. Y. 146; *Kerchies* v. *Schloss*, 49 How. 284, 285; *Frazier* v. *Truax*, 27 Hun, 587; *In re Lewis*, 81 N. Y. 421; Story on Part. § 152; *Grande* v. *Colwell*, 5 Cow. 489; *Dobb* v. *Holses*, 16 Johns. 33; *Effingham* v. *Ensworth*, 7 Wend. 326; *Bendall* v. *Hattrick*, 1 Sweeny, 405; *Laverty* v. *Garraty*, 1 Wend. 529–531; *Bank of Rochester* v. *Bowen*, 7 id. 158; *Wilson* v. *Petterkin*, 14 id. 146; *Stainers* v. *Tyson*, 3 Hill, 279; Pothier on Obligations, 83; *Geary* v. *Cockroft*, 1 J. & S. 146.) Upon the evidence the court would have been warranted in finding additional facts which would have supported the conclusions of law found. (Story on Part. § 133; *Rogers* v. *Peters*, 12 Pet. 229; *Menagh* v. *Whitwell*, 52 N. Y. 146; *Ransom* v. *Van Deventer*, 41 Barb. 307; *Victor* v.

Henlein, 34 Hun, 562; *Shultz* v. *Hoagland*, 85 N. Y. 464–468; *De Camp* v. *Marshall*, 2 Abb. [N. S.] 373; *Bailey* v. *Howe*, 18 J. & S. 100; *White* v. *Fagin*, 18 Wkly. Dig. 358.)

Peckham, J. We think this judgment should be affirmed for the reasons stated in the opinion given at the General Term. We will add but a few words, which are suggested by the argument of the counsel for the appellant before us. The construction which the Supreme Court gave to the language used in the assignment is, we think, the only one permissible.

The effect of the assignment is in one contingency to devote part of the partnership property to the payment of individual debts before payment in full of partnership debts, and there is an express finding that there were such individual debts of one of the partners. There is evidence sufficient to justify it. In *Crook* v. *Rindskopf* (105 N. Y. 476) the members of the firm executed the assignment for the benefit of their creditors, and devoted all their property to the payment of the copartnership debts, and after such payment, if there should be any residue, it was to be applied to the payment of the individual debts of the assignors or either of them. One member of the firm owned individual assets of the value of $30, and the other of the value of $10, and their individual indebtedness was of an unequal amount. It was thought hardly worthy of attention on account of the smallness of these amounts, but the construction of the assignment was, nevertheless, entered upon, and it was held that the language did not provide for the creation of a fund in the surplus after payment of firm debts, to be used indiscriminately in the payment *pro rata* of the individual debts of the members of the firm, but that if there were a surplus, the share of each partner therein was to be applied to the individual debts of such partner. The language used here does not permit this construction. The payment of the firm debts is not provided for in full before any payment can be made the individual creditors, but the contrary is the fact in a contingency provided for in the assignment. If there are not enough assets to pay the preferred firm creditors,

no sufficient answer to the charge of fraud arises from that fact.

If an insolvent firm appropriate by an assignment partnership property to the payment of the individual debts of one partner, the assignment is fraudulent and void. (*Wilson* v. *Robertson*, 21 N. Y. 587.)

In case of such an assignment it has been held (*Hurlbert* v. *Dean*, 2 Keyes, 97), if it be shown and found as a fact that there are no individual debts thus provided for, the presumption of fraud may be repelled and the assignment upheld. But in this case the finding is exactly contrary. And in *Crook* v. *Rindskopf* (*supra*), the assignment having provided first for the full payment of firm creditors, such creditors, it was said, were not aggrieved, for the intention could not have been to defraud them by providing for the payment of individual creditors thereafter, even though the individual partners owned unequal amounts of individual property, which might be affected by a provision to pay the debts with the surplus *pro rata*. It never has been held that in a case where partnership assets have been by the assignment devoted in certain contingencies to the payment of individual debts, while a portion of the partnership debts remained unpaid, the stamp of fraud which the law places upon such a transaction can be rebutted by any evidence that the parties did not intend to commit a fraud.

In this case the plaintiffs endeavored to prove a fraudulent intent outside of and upon other facts than this provision of the assignment. Even if they had been unsuccessful in that endeavor, the failure did not breathe vitality into the instrument which the law denounces as a fraud because of the existence of the illegal provision therein. If the fact be that there are not enough funds in the hands of the assignee to pay the preferred debts of the firm, the other fact remains that the assignment provided for the payment of the individual debts with the firm property in certain contingencies, and the want of firm and individual assets sufficient to pay the firm debts, does not cure this vice. The failure of assets to pay preferred

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creditors is not like the non-existence of individual debts in a case where an assignment provides for their payment out of firm property. There is no contingency in such case and the provision is mere surplusage, hence totally immaterial. But mere absence of assets with which to pay as directed may depend upon many contingencies. The illegal intent to devote the property to an unlawful use is there in any event. Good fortune in realizing upon sales of the property assigned may produce the assets, while in the other case there are no individual debts and no chance can create them.

Whether the provision is void or valid should not depend upon a fact of this kind, which may or may not exist, when the assignment comes to be carried out. The invalid provision is made in case it should exist, and it is invalid when the assignment is made.

There is no error in the record and the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. THE BRUSH ELECTRIC MANUFACTURING COMPANY, Appellant, *v.* EDWARD WEMPLE, Comptroller, Respondent.

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The relator, a domestic corporation, organized under the General Manufacturing Act (Chap. 40, Laws of 1848), is engaged in the business of producing electricity and supplying the same to customers for lighting purposes. In proceedings to review by certiorari a decision of the comptroller holding the relator liable to pay taxes and penalties imposed by the act of 1880, providing for the assessment and payment of taxes by certain corporations (Chap. 542, Laws of 1880), and the act of 1881, amending the same (Chap. 361, Laws of 1881), *held*, that it was a manufacturing corporation within the meaning of the provision of said act exempting such corporations, and so was exempt from taxation until the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause.

Statement of case.

The decision was made by the comptroller upon application of the relator, under the amendatory act of 1889 (Chap. 463, Laws of 1889), which authorizes the comptroller to revise and readjust any account for taxes settled by any corporation. The account against the relator was settled by the comptroller July 3, 1889, immediate notice of the assessment was given to it, and, after the expiration of thirty days, no proceedings having been taken to review the same, as provided by said act of 1881 (§ 17), as amended in 1885 (Chap. 501, Laws of 1885), the comptroller issued his warrant for the collection of the tax. It was claimed on behalf of the defendant that the relator had, by the delay, lost his right of review by certiorari. *Held*, untenable.

The relator, up to the time the tax was so settled and adjusted in 1889, had made no reports and paid no taxes. It was claimed by defendant that the relator had another remedy, that is, by appeal from the determination of the comptroller to a board constituted for that purpose by the act of 1881 (§ 1), and so that under the provision of the Code of Civil Procedure (§ 2122), which provides that, except when otherwise prescribed by statute, a writ of certiorari may not be issued to review any determination which can be adequately reviewed upon appeal, to any body or officer. *Held*, untenable; that the said provision for appeal did not apply to a case where the corporation claiming it was not subject to any tax whatever, and had made no report, but simply to cases where reports having been made, the comptroller, not satisfied therewith, has proceeded to make a valuation of his own, and settled an account against the corporation on that valuation; that the valuation and determination in question was made, not under the section of said act containing said provision for appeal, but under a section (§ 12) added by the amendatory act of 1882 (Chap. 151, Laws of 1882), as amended in 1885 (Chap. 501, Laws of 1885); and so that, as by the act of 1889, under which the application was made (§ 20), express provision is made for review by certiorari of the action of the comptroller, the relator was entititled to the writ.

(Argued December 14, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made September 8, 1891, which modified, and affirmed as modified, a decision of the comptroller of the state, denying a petition of the relator for a revision and readjustment of accounts for taxes against it, imposed under the act of 1880 (Chap. 542, Laws of 1880), and the acts amendatory thereof.

The facts, so far as material, are stated in the opinion.

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John W. Houston for appellant. The relator had exhausted the remedy given it by the act under which the tax was levied, and was, therefore, entitled to the writ. (Laws of 1889, chap. 463; Laws of 1880, chap. 542; Laws of 1881, chap. 361.) The operations of companies engaged in the business of the relator are essentially manufacturing operations, the result is a manufacture, and consequently the relator is a manufacturing corporation within the meaning of the statute exempting such corporations from the payment of a tax to the state. (*N. G. L. Co.* v. *Brooklyn*, 89 N. Y. 409; *People* v. *K. I. Co.*, 99 id. 181; *E. U. M. Co.* v. *F. E. L. & P. Co.*, 82 Me. 464; 150 Mass. 392; *Emerson* v. *Commonwealth*, 108 Penn. St. 111.) The legislature itself has in various statutes applied the word "manufacturing" to companies engaged in the business of electric lighting, and has thereby indicated the meaning which it attached to the word as used in chapter 542 of the Laws of 1880. (Laws of 1882, chap. 73, § 1; Laws of 1887, chap. 716; Laws of 1890, chap. 506, § 6.) The legislature has shown its construction of the act of 1880 by deeming it necessary in 1889, in order to enable the state to impose a state tax upon electric light companies, to amend the act of 1880 by expressly declaring that such companies should not be exempt. (Laws of 1880, chap. 542; Laws of 1881, chap. 361; *N. G. L. Co.* v. *City of Brooklyn*, 89 N. Y. 409; *People* v. *Bd. Suprs.*, 16 id. 424; *People* v. *N. Y. F. D. D. Co.*, 92 id. 187.) The executive officers of the government have themselves construed the word "manufacturing" to include electric lighting companies. This construction is entitled to great weight. (*U. S.* v. *Moore*, 95 U. S. 763; Sedg. on Dam. 216; *People ex rel.* v. *Beach*, 19 Hun, 259.)

Charles F. Tabor, Attorney-General, for respondent. The relator was not entitled to the writ of certiorari granted herein by the court. (Laws of 1889, chap. 463; *Gilmore* v. *City of Utica*, 121 N. Y. 569; *People* v. *Conner*, 46 Barb. 333; *People ex rel.* v. *Town Clerk*, 29 Hun, 216.) So far as any question concerning the validity of the tax sought to be

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did solve that doubt in the act of 1889 by declaring that they were not so included, and the comptroller was right and justified in following this legislative declaration in the assessment made herein. (Laws of 1879, chap. 512; Laws of 1880, chap. 542; *N. G. L. Co.* v. *City of Brooklyn*, 25 Hun, 567; 89 N. Y. 409; Laws of 1881, chap. 361; Laws of 1889, chap. 533; Laws of 1882, chap. 73; *Vicksburgh* v. *Dennis*, 116 U. S. 665; *C. R. R. Co.* v. *Guffey*, 120 id. 575; *Y. R. R. Co.* v. *Thomas*, 132 id. 185.)

O'BRIEN, J. This appeal brings here for review, a judgment entered upon the return to a writ of certiorari, sued out by the relator, for the purpose of reviewing a decision or determination of the defendant as comptroller of the state, whereby the relator was adjudged liable to pay certain taxes and penalties to the state under chaper 361 of the Laws of 1881, and the laws supplementary thereto and amendatory thereof, providing for the assessment and payment of taxes to the state by certain corporations. The relator is a domestic corporation, organized by filing a certificate February 17, 1881, under the act of 1848, providing for the formation of corporations for manufacturing and other purposes. Since its organization it has been engaged in the business of producing electricity and supplying the same to its customers in the city of New York for the purpose of lighting public and private places. The relator contended that it was a manufacturing corporation, and as such exempt from paying the tax to the state upon its business, and made no reports and paid no tax till July, 1889, and then only by force of chapter 353 of the Laws of 1889, which took electric light companies, by name, out of the exemption clause in favor of manufacturing corporations. The relator is, beyond all controversy, liable for the tax since the passage of the act last mentioned, but denies that it is liable for anything before, as the exemption clause covering manufacturing corporations then applied to it. In the year 1889 the comptroller caused an examination of the affairs of the relator to be made by a commissioner

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account against the relator which established the assessment, so far as it was within the power of the comptroller to do so, was settled July 3, 1889. Immediate notice of the assessment was given to the relator, and after the expiration of thirty days, no proceedings having been taken to review the same, under section 17 of the act of 1881, as amended by chapter 501 of the Laws of 1885, the comptroller issued his warrant for the collection of the tax. The learned attorney-general contends that the relator, by delay, lost the right of review by certiorari. This would probably be so, except for subsequent legislation, which must be presently noticed. The Code (§ 2122) provides that, except as otherwise prescribed by statute, a writ of certiorari cannot be issued to review any determination which can be adequately reviewed by an appeal to a court, or to some other body or officer, and it is argued by the attorney-general that the relator could have appealed from the determination of the comptroller to a board composed of the secretary of state, attorney-general and state treasurer, under the last clause of section 1 of the act of 1881, and for that reason was not entitled to the writ. The provision for an appeal to this board does not seem to apply to a case like this, where the officers of the corporation, taking the position that the company was not subject to any taxation whatever under the act, neglect or refuse to make any report, but to cases where reports are made by the proper officers of the corporation, and the comptroller, not being satisfied with such report, proceeds to make a valuation of his own, and to settle an account against the company upon the basis of such valuation, then the company may appeal to the board above mentioned, and the question presented by the appeal would seem to be whether the valuation made by the corporate officers, or by the comptroller in disregard of it, is the correct and just one. Here the valuation and determination was not made under section 1, but under section 12 of the act of 1881, as amended by chapter 151 of the Laws of 1882, and chapter 501 of the Laws of 1885. But the act of 1889, above referred to, which gives to the relator the right to apply for a revision and resettlement of the tax, also prescribes a

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policy. The courts held that gas companies were manufacturing companies (*Nassau Gas Light Co.* v. *City of Brooklyn*, 89 N. Y. 409), and the legislature, in 1881, proceeded to amend the law by providing that gas companies should not be taken to be within the exemption. So electric lighting and power companies were taken out of the exemption by the use of similar language. (Laws of 1889, chap. 353.) These amendments, it is contended in behalf of the relator, show a construction by the legislature of the term "manufacturing corporations," in harmony with its claims in this case. In so far as the action of the legislature has any bearing on the question at all, it is, no doubt, in that direction. But the circumstances under which the amendment of 1889 was made deprives it of much of the weight that courts are accustomed to give to what is known as legislative construction. A controversy then existed, as it had existed for some time before, between the state on the one hand and the companies on the other. The companies claimed that they were exempt, as manufacturing companies, from liability to pay taxes to the state under the act, while the comptroller, representing the state, asserted the contrary. In this condition of things the legislature stepped in and enacted that thereafter the companies should not be deemed within the exemption clause, and this settled the controversy so far as the future was concerned, but, as to the years that had elapsed when no report was made or any taxes paid, the question was left substantially where it was before. When a material change in phraseology is made many years after the passage of the act, and after controversies and differences in regard to its construction have arisen, there is sometimes a presumption that the legislature intended by the amendment to add a new provision to the original act, and to make it apply to a case to which it did not apply before. When the legislature takes certain property for the purposes of taxation, out of an exemption clause by name, the question arises whether there is not a presumption in such a case that it was within it before. (*People* v. *Board of Supervisors*, 16 N. Y. 431; *People* v. *Knickerbocker Ice Co.*, 99 id. 184.)

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or carrying on some manufacturing business, though granting all that is said by experts and others about electricity as a natural element or force. To say that electricity exists in a state of nature, and that a corporation engaged in the business that the relator is, collects or gathers it, does not fully or accurately express the process by means of which it is enabled to sell and deliver something useful and valuable to its customers. The business in which the corporation is engaged renders it necessary, in the first place, to invest a large amount of capital in a plant, which may appropriately enough be called a factory. Then it must purchase and consume a vast amount of coal to produce steam, and to furnish power for the operation of machinery. Then it supplies and operates a complicated system of machinery such as boilers, engines, dynamos, shafting, belting and such other things as are commonly used in manufacturing establishments, and then by means of wire, cables and lamps it lights streets and private houses by electricity for a compensation. But the electricity or electric currents that produce this result cannot properly be said to be the free gift of nature, gathered from the air or the clouds. . It is the product of capital and labor and in this respect cannot be distinguished from ordinary manufacturing operations. According to the common understanding the electricity or thing which produces the results, from which the corporation derives its income, is generated or produced by the application of power to machinery and thus, by means of a process wholly artificial, the relator is enabled to sell the product of its operations to its customers. Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is, in every just sense of the term, a manufacturing corporation. The mere appropriation or use of an article or thing which is furnished by nature is not a manufacturing operation. The liberation of natural gas from its hiding place in the earth, and its transportation through pipes to consumers, would not properly be called a manufacturing operation, but

illuminating gas and it
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nd on a metal core and

and is revolved by the power communicated from the engine through the means of the belt. The armature is revolved within or between the ends of a large horseshoe magnet, the opening of which is downward. The magnet is made by winding a soft iron horseshoe, or soft curved horseshoe shaped iron with a coil of conducting wire, and sending through the coil a current of electricity. When once vitalized by such current, the magnet never loses this magnetic property, even after the current stops, but is ever afterwards available for the purpose of electric currents, upon the armature being revolved between the poles of this magnet. By the rapid revolution of the armature within what is termed the field of force between the poles of the magnet, this mysterious force or energy is accumulated, known as electricity, and is thence conducted over copper bars or mains throughout the territory or city in which it is used, and is distributed on smaller wires or mains to the houses or places which are to be lighted."

The materials from which all manufactured things originate exist in a natural state; but the manufacturer, by the application to these materials of labor and skill, gives to them a new and useful property. The electricity which is generated and transmitted by the operations of the relator and which, under its manipulations, illuminates houses and streets, is a very different thing from that mysterious element that is said to pervade nature. The attorney-general has attached to his brief in this case a very elaborate and able opinion by the Court of Common Pleas in Pennsylvania, in the case of *Commonwealth of Pennsylvania* v. *U. S. Electric Lighting Company*, in which the learned judge arrives at the conclusion that companies of this kind are not manufacturing corporations. It is proper to say, however, that the highest court of that state, while affirming the judgment rendered by the learned judge on other grounds, did not assent to his views that electric light companies are not manufacturing corporations. (*Commonwealth of Pennsylvania* v. *Northern Electric Light and Power Company.*) The case is not yet reported, but the following passage from the opinion of the court by WILLIAMS, J.,

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it makes, or 'brings into being,' a
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be right or wrong. We have nc
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bmitted to the comptroller by the
revise and resettle the tax, thu

rical energy, which is manufactur
ing corporations, originally resi
n, the coal which is burned, or,

speaking, from the heat which is produced by the combustion of coal. Electrical energy is produced at the central station; it may be stored up in cells of definite capacity known as accumulators; it may be, and in fact is, measured and sold in determinate quantities at a fixed price precisely as are coal, kerosene oil and gas. It may be conveyed to the premises of the consumer upon a wagon, boxed up in an accumulator, or it may be sent through a wire, just as gas or oil may be transported either in a closed tank or forced through a pipe. Having reached the premises of the consumer, it may be used in any way he may desire, being, like illuminating gas, capable of being transformed either into heat, light or power at the option of the purchaser."

The legislature has, in various acts passed since the corporation tax law was enacted, described the process of generating electricity as a manufacturing process, and recently in a revision of the statutes providing for the incorporation of such companies, they are described as corporations for "manufacturing and using electricity." (Laws 1890, ch. 566, art 6, § 60; Laws of 1882, ch. 73, § 1; Laws 1887, ch. 716.)

This is also true with respect to the statutes passed for the incorporation and regulation of such companies in England and in many of our sister states. (45 and 46 Vict. ch. 56; R. S. Ohio, 1890, § 8752.) We think that, until the amendment of 1889, the relator was exempt from payment of taxes to the state under the exception in the statute in favor of "manufacturing companies" generally. The judgment of the General Term and determination of the comptroller should be reversed, and the comptroller directed to resettle the account, and to credit the relator in its account the amount of the tax and penalties paid, with interest from the date of payment, and costs in all courts to the relator.

All concur.

Judgment accordingly.

Statement of case.

. THE AMERICAN CONTRACT
ppellant, *v.* EDWARD WEMP

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4, 1891; decided January 20, 189

gment of the General Term
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Statement of case.

made May 5, 1891, which confirmed a decision of the comptroller of the state denying the application of the relator for a revision and readjustment of accounts for taxes against it.

The facts, so far as material, are stated in the opinion.

Adrian H. Joline for appellant. This court has power to review the action of the General Term by which the proceedings of the comptroller were confirmed. (Laws of 1889, chap. 463, § 20; Code Civ. Pro. § 190.) The accounts as settled by the comptroller in the case of the relator were erroneous and illegal, because during the years 1887, 1888 and 1889 the relator was not doing business in this state, within the meaning of the statute. (Laws of 1880, chap. 542, § 3; Laws of 1881, chap. 361; Laws of 1885, chap. 359; Laws of 1889, chaps. 193, 353; *People* v. *H. S. M. Co.*, 105 N. Y. 76; *People* v. *E. T. Co.*, 96 id. 387; *In re A. & C. R. R. Co.*, 9 Blatchf. 390; *S. C. O. Co.* v. *Wemple*, 44 Fed. Rep. 24; *People ex rel.* v. *Comrs.*, 59 N. Y. 40; Laws of 1882, chap. 151; Laws of 1886, chap. 143; *People* v. *A. B. T. Co.*, 117 N. Y. 241.) The accounts for taxes as settled by the comptroller were erroneous and illegal, because, as the relator employed no part of its capital stock in this state, there was no basis for a tax. (Laws of 1880, chap. 542, § 11; Laws of 1882, chap. 151; Laws of 1885, chap. 501; *People* v. *H. S. M. Co.*, 105 N. Y. 76; *In re A. & C. R. R. Co.*, 9 Blatchf. 390; *People* v. *Comrs., etc.*, 59 N. Y. 40; *People ex rel.* v. *Coleman*, 126 id. 433; 1 Morawetz on Corp. § 435; *Williams* v. *W. U. T. Co.*, 93 N. Y. 102; *People ex rel.* v. *A. B. T. Co.*, 117 id. 241, 256; *Gordon* v. *Mayor, etc.*, 5 Gill. 231; *State of Missouri* v. *H. & St. J. R. R. Co.*, 37 Mo. 265.) The proceedings of the relator were regular in all respects. (*People ex rel.* v. *Wemple*, 15 N. Y. Supp. 711; *People ex rel.* v. *Wemple*, Id. 718; *People ex rel.* v. *Wemple*, Id. 446.)

Charles F. Tabor, Attorney-General, for respondent. The writ of certiorari herein should be quashed, because application for it was not made within thirty days after service upon

by the comptroller of notice of
uestion; and because the papers
the writ was made and notice of
upon the comptroller as required
of the Laws of 1881, as amende
s of 1885. (*State* v. *County of*
rit of certiorari should not hav
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easurer, as provided in section 1
f 1881. (Code Civ. Pro. § 2122;
600; *In re P. P. & C. I. R. R.*
Sherman, 15 Hun, 575; *People*
Y. 256.) The determination of
pon the merits. (*P. P. C. Co.*
81.) The question of the valuati
ployed in this state was one of
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n a review by certiorari. (Code
el. v. *Comrs., etc.*, 82 N. Y. 360;
9 id. 154; *People* v. *Davenport*
Keator, 36 Hun, 594; *People* v.
S. R. 358; *People* v. *McCarthy*,
Comrs. of Taxes, 104 id. 240; *P*
1; *People* v. *Weaver*, 34 Hun,
Abb. [N. C.] 1; *People ex rel.* v.
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and its business transacted. (*U.*
2 N. Y. 351; *O. S. Factory* v.
Co. v. *Scheu*, 19 id. 408; *C. M*
45; *People* v. *Comrs. of Taxes*
ises of the relator constitute a pa
nd may properly be considered is

value of such property and the amount of its capital employed in this state. (*People* v. *O'Brien*, 111 N. Y. 1; *People* v. *B., etc., R. R. Co.*, 89 id. 84; *N. O., etc., R. R. Co.* v. *Delamore*, 114 U. S. 501; *M., etc., R. R. Co.* v. *Railroad Comrs.*, 112 id. 619; *H. Ins. Co.* v. *New York*, 134 id. 601.) All the property which the relator owned or held within this state during the specified years constituted a part of its capital employed here. (*People* v. *Comrs., etc.*, 23 N. Y. 192; 2 Wall. 200; *State Railroad Tax Case*, 92 U. S. 602; *R. R. Co.* v. *Vance*, 96 id. 455; *People* v. *Coleman*, 126 N. Y. 438.)

GRAY, J. The relator, a domestic corporation, organized and existing under the Manufacturing Act of 1848, appeals from an order of the General Term of the Supreme Court, which affirmed the determination of the comptroller of the state, upon an application to him for a revision and readjustment of the account of taxes settled against the relator pursuant to the provisions of chapter 542, Laws of 1880; as amended by chapter 361, Laws of 1881; chapter 151, Laws of 1882, and chapters 359 and 501, Laws of 1885. The basis of the application was the allegation that the previous settlement by the comptroller of the account for taxes, for three years ending November 1, 1889, included taxes which could not legally be demanded. The points raised by the relator were that, as it was not doing business in this state during these years, it was not subject to taxation, and that, as no part of its capital was employed here, there was no basis for the tax. The facts are undisputed and show that the relator was incorporated in 1882, with a paid-up capital of $2,000,000, and, by its certificate of incorporation, was "formed for the purpose of carrying on some part of its business out of the state of New York, but the operations of said corporations are to be conducted and carried on in and from the city, county and state of New York, which is to be the principal place of business of the said company." During the period in question the company was engaged in dredging, on the Panama canal. It had an office in New York city for the use of its officers and

s, and it kept bank accounts there.
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n and resettlement of accounts," ma
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amendment of the act of 1880, up
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ation is strongly evidenced. But,
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ng the proceeding of the relator he
meaningless and purposeless. As the
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pinion in the case of the *People e*
y, decided at this term, it need not
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rning the main question presented b
no doubt. The relator, being a don
e to pay a tax upon its franchise an

measured by the amount of its capital stock found to be employed in this state. By section 3 of the act, every corporation is made subject to such a tax, which is incorporated or organized under the laws of this state, or which is incorporated under the laws of any other state or country and is doing business in this state. The qualifying words "and doing business in this state" have reference only to foreign corporations. The appellant's argument, that they prescribe a limitation upon the right to tax a domestic corporation, disregards their proper sense, as gathered from their juxtaposition in the section, and it would import into the legislation a restriction upon the jurisdiction of the state to impose a tax upon domestic corporations, for which there is no reason and which is not supported by authority. As to corporations, created under the laws of this state, the power to tax their franchises and business is undoubted and general; but as to corporations, which are created under the laws of another state or country, jurisdiction for taxing purposes is gained from the business which they do in this state and the tax is one upon that business. Foreign corporations coming into this state, for the purpose of doing some part of their corporate business here, are placed under the obligation to bear some portion of the general burden of taxation, in return for the privileges and benefits enjoyed. The words of this section, which we are considering, may be said to be the recognition by the legislature of the limitation upon its powers, or upon the right to levy taxes, with respect to foreign corporations. Taxation under the act as to such is limited to those "doing business in this state" and the tax is assessed upon that business. In *People* v. *Equitable Trust Co.* (96 N. Y. 387), the defendant, against which this tax law of 1880 was sought to be enforced, was a foreign corporation, having an office in this state. It was there said of the tax that "so far as section 3 imposes a tax upon corporate franchises, its operation must be confined to corporations created under our laws, and as to foreign corporations the tax is imposed solely upon business." "This tax," Judge EARL in that case observed, "upon the business of foreign corporations is a spe-

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stock, made it "a tax upon capita

franchise," was denied. "We also think," said RUGER, Ch. J., in that case, "it may safely be assumed that so long as a corporation continues business under its charter, the privilege of so doing is of some pecuniary value to it and that there is no valid reason why the value of the capital stock may not be used as an element for determining the amount of tax levied upon franchise." The corporation and the franchise are as distinct as are the substance and its attribute. The franchise of the corporation is the exclusive exercise of the rights granted. (Kyd on Corp. p. 15.)

The legislation of 1880 and 1881 was the creation of a new system of taxation of corporations and provided a new method of regulating the contribution by them to the payment of state expenses by assessments, not upon property, but upon privilege and business. The scheme is a complete and independent one. It is made just and perfect in this respect by the declaration in section 8 that the corporations, joint stock companies and associations, mentioned in the act as taxable, shall thereafter be exempt from assessment and taxation for state purposes, except upon their real estate, and as therein provided; but shall in all other respects be liable to assessment and taxation as heretofore. (*People* v. *Gold & Stock Tel. Co.*, 98 N. Y. 67.)

A consideration of the provisions of this law, which was framed so as to bring all the domestic corporations, joint stock companies and associations described under the obligation to pay a tax into the state treasury, to be assessed upon their franchises and business, and exempting them from taxation otherwise for state purposes, except upon their real estate and as in the law provided, warrants the conclusion that the liability is in no sense restricted to such as do business in this state, and that a just measure of liability is arrived at, in those cases where the capital stock is partially employed in this state, by fixing the basis for the tax by the amount which is employed here.

The relator being, then, subject to taxation under the act, the determination of the comptroller as to the assessment and taxation, unless clearly shown to have been erroneous, should not be disturbed. This principle has been asserted in cases

where it has been sought to review the decisi
officers charged with the duty of determining th
property for the purpose of assessment and ta
applicable here. (*People ex rel. Westchester*
v. *Davenport*, 91 N. Y. 581; *People ex rel. Os*
missioners, etc., 99 id. 154; *People ex rel. Pa*
Co. v. *Commissioners, etc.*, 104 id. 240.)

There was sufficient evidence here, upon whi
troller could act in finding a basis for assessment

The relator will be presumed to have employe
capital in the city of New York; for there, ac
certificate of incorporation, was its principal pla
and from there were its operations conducted;
accounts there and paid out moneys for matt
with, and more or less essential to the purposes
ration; and, if the comptroller fixed the amount
employed here in the way he did, the company h
to complain of his account against it. In the
and as matter of fact some capital was employe
cannot see that the comptroller erred in his dete

The judgment of the General Term should
with costs.

All concur.

Judgment affirmed.

ISAAC ROMAINE, as Receiver, etc., Appellant,
v.
CHAUNCEY et al., Respondents.

129 566
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129 566
150 272

129 566
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129 566
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129 558
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129 566
181 U S 579

Alimony awarded to an innocent wife by a court of equi
to a decree of divorce in her favor, is simply an allowa
port and maintenance; the awarding it is not the enfor
due to her from her husband, but of the marital oblig
from which the husband, because of his misconduct, is
the decree; which obligation is made specific and is
court. The allowance made becomes a debt only in th
general duty over which he had a discretionary control
into a specific duty. (Code Civ. Pro. § 1759.)

Stevenson v. *Stevenson* (84 Hun, 157), distinguished.

Statement of case.

While, therefore, alimony is in one sense property of the wife, it is a specific fund provided for a specific purpose only, whose express limitations take it out of the general law of property, and as it is created by equity, it should have the protection of equity, so that it may not be perverted to a purpose for which it was not intended.

Accordingly *held*, that the court would not lend its aid to compel the appropriation of alimony awarded to a wife in a decree of divorce to the payment of a debt contracted by her and actually subsisting prior to the date of the decree.

It seems, a court of equity when applied to for its active assistance in the enforcement of a claim founded upon a bare legal right, will either refuse its aid where granting it will work injustice, or will impose conditions calculated to mitigate or remove the injustice.

Reported below, 60 Hun, 477.

(Argued December 14, 1891; decided January 20, 1892.)

APPEAL from an interlocutory judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made June 26, 1891, which reversed an interlocutory judgment entered upon an order of Special Term, which overruled demurrers to the amended complaint in the above-entitled action, and directed final judgment in favor of defendants, unless an appeal was taken in sixty days.

This action was brought by plaintiff, who was appointed receiver of the defendant Maria L. Chauncey in supplementary proceedings, to discover and apply assets alleged to be in the hands of the defendant Michael Chauncey, to the payment of a judgment recovered against her March 21, 1884. Michael Chauncey was formerly the husband of Maria L., but on July 16, 1888, in an action brought by her, a decree was rendered by which they were absolutely divorced, and the husband was directed to pay his wife $350 per month alimony. He had no other property belonging to her. The action was originally brought against Michael Chauncey, but upon his demurrer, Maria L. was also made a defendant.

Geo. V. N. Baldwin for appellant. The appellant, as receiver appointed by the Supreme Court of the state of New Jersey, has a perfect right to maintain this action in the courts

state. (*Runk* v. *St. John*, 29 Barb. 58
be, 84 N. Y. 367, 385; *Kelly* v. *Cra*
on v. *C. Bank*, 32 id. 21, 43; *In re Wa*
ot necessary to show that the receiver has
in New Jersey. (*Barclay* v. *R. M. C*
son v. *Maxwell*, 44 N. J. 316.) If the
ive legal capacity to sue, yet it does not
the complaint that he does not have suc
being the case, it follows that the de
lant cannot hold, and that the objection c
rise than by answer. (*P. Bank* v. *Donnell*
mplaint sets forth facts amply sufficient
of action. The main principle on which
a provision made in a judgment for divo
t is liable to be reached and seized by
son v. *Stevenson*, 34 Hun, 157; 2 Bish
997; *Penguet* v. *Phelps*, 48 Barb. 55
ha, 43 Hun, 181; *Erkenbrack* v. *Erkenb*
Eadie v. *Slimmon*, 26 id. 9; *Forrest* v.
25 N. Y. 501; *Burr* v. *Burr*, 10 Paig
Miller v. *Clark*, 23 Ind. 370.)

l Gale for respondents. Permanent ali
wife by a judgment of absolute divorce
to the payment of a judgment against
hich accrued prior to the judgment of d
ro. § 1759; *Burr* v. *Burr*, 1 Hill, 207;
l. 21; *Daniels* v. *Linnsey*, 44 La. 56
, 44 Wis. 354; *Crain* v. *Cavana*, 62 E
v. *Clark*, 6 W. & S. 85–87; *Pain* v. *I*
35; *Menzie* v. *Anderson*, 65 Ind. 23
, 151 Mass. 266; Code Crim. Pro. §§ 9
. *Westerman*, 62 Mich. 170; *Eadie* v.
9; *Barry* v. *E. L. Ins. Co.*, 59 id.
bell, 122 id. 397; *Bliss* v. *Lawrence*, 58
v. *Wilson*, 122 id. 478; *Pope* v. *Elliot*,
hip v. *Patterson*, 7 Watts, 547; *Jordan*

62 Mich. 170; *Huckley* v. *Muskegon*, 58 id. 454; *Nichols* v. *Eaton*, 91 U. S. 716.) Upon grounds of public policy, the plaintiff, as a receiver appointed by the court of another state, cannot maintain this action in the courts of this state. (*In re Waite*, 99 N. Y. 433; Code Civ. Pro. §§ 1759, 1772, 1773; Code Crim. Pro. § 901.)

FINCH, J. This case presents an interesting question which we are called upon for the first time to decide. There are no direct and conclusive precedents to be followed; no explicit and specific statutes coming with an appropriate direction; but only a broad general rule on the one side and a just and strong necessity for an exception to it on the other. The question is, whether alimony, awarded to an innocent wife by a court of equity as incidental to a decree of divorce in her favor, can be appropriated by her creditor to the discharge of a debt contracted by her and actually subsisting prior to the date of the decree. The question was different in *Stevenson* v. *Stevenson* (34 Hun, 157), cited as a pertinent authority, for in that case the decree of divorce was granted in 1855, and the creditor's judgments obtained in 1880. A debt contracted by the wife after the decree, presumably for her support, and with natural reliance upon the alimony by the creditor as the means of payment, stands upon a very different footing from a debt of the wife contracted prior to or during the marriage and before its judicial dissolution. In the latter case two new elements enter into the question; one, the imposition of an unfounded duty on the husband, and the other, a perversion of the decree from its definite and intended purpose, and from that authorized by the law.

Alimony, as we all understand, is an allowance for support and maintenance, having no other purpose and provided for no other object. Like the *alimentum* of the civil law, from which the word was evidently derived, it respects a provision for food, clothing and a habitation, or the necessary support of the wife after the marriage bond has been severed; and since what is thus necessary has more or less of relation to the con-

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or these circumstances, but never lose
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Burr, 10 Paige, 20), it serves only to
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sities of the wife. Thus the prevaili
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v. *Collins*, 80 N. Y. 1.) And when
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nchanged. The allowance becomes
that the general duty over which th
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ne wife, but rather a general duty o
nd measured by the court seem to
(*Wallingsford* v. *Wallingsford*, 6
v. *Lindley*, 44 Iowa, 567; *Burr* v. *Bu*

Guenther v. *Jacobs*, 44 Wisc. 354; *Crain* v. *Cavana*, 62 Barb. 109; *Jordan* v. *Westerman*, 62 Mich. 170.) And so it follows that, as during the marriage, the husband, while bound to support the wife, was not bound to pay her pre-existing or separate debts, so, after the divorce, he must continue the support, but is not required to pay out of his means furnished for that purpose the wife's antecedent debt. The decree cannot logically work the miracle of transforming the duty which he does owe into one which he does not, and never did owe; and yet that result is inevitable if the antecedent creditor is at liberty to swoop down upon the provision and carry it away for his own use.

That result accomplishes another thing. It perverts and nullifies the decree of the court, and leaves the judgment specifically made for one purpose to operate wholly for another, and so obstruct and destroy the humane intent of the law. There is no doubt, of course, that the wife's right to alimony comes from the statute and not from the common law. If that proposition needed the aid of a full and historical argument in its support, such has already been furnished by this court. (*Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456.) We must look then to the provisions of the Code of Civil Proceedure, which has recast and reproduced the terms of the previous statutes, to see when and for what purpose alimony may be allowed. Section 1769 regulates the temporary alimony which may be awarded *pendente lite*. The terms of the provision are that in an action for an absolute divorce or for a separation, the court may, in its discretion, make orders requiring the husband to pay any sum or sums of money necessary to enable the wife to defend the action or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. It seems to me impossible to misunderstand the force or meaning of that provision. Its palpable purpose is to enable the wife to prosecute her suit and save her from starvation or beggary during the process. Is it conceivable that the court making such order is bound to stand silent and submissive while the whole scope and purpose

of its provision is perverted and nullified? If t
law of divorce has no help or remedy for the inju
happens to be in debt. She cannot hire counsel
self and her children pending the litigation, because
ing creditor seizes the humane provision at the
made. The court might as well not make it at al
say there is no divorce or defense for an in
Undoubtedly, in such a known state of the la
would find some way of making its order effectiv
by interposing a trustee in behalf of the wife, bu
ever yet supposed that such a safeguard was n
why should it be? The antecedent creditor h
against the fund; the husband is not bound to
such creditor's benefit, nor the wife to accept it
which gives her a stone when she asks for bre
such character has the allowance of temporary
considered that an assignment of it by the wife t
as compensation for his services has been disrega
aside as being a misappropriation of a fund av
special purpose. (*Jordan* v. *Westerman*, *supra*.)

Similar considerations pertain to section 1759
which regulates permanent alimony. The secon
is this: "The court may, in the final judgment o
marriage, require the defendant to provide suit
education and maintenance of the children of
and for the support of the plaintiff as justice req
regard to the circumstances of the respective pa
the court may require the husband to provide fo
of the wife, but may not require him to furnis
the payment of her debts. He never stood unde
tion and the decree of divorce cannot impose it
right to insist that his allowance shall not be div
for which he did not in fact supply it, and was u
gation to supply it, and to resist, as he stands he
claim upon it which, as against him, is wholly
and a complete perversion both of the decree an
The plaintiff in his character of receiver for t

creditor comes into a court of equity in pursuit of equitable relief, into the same court which devoted the fund to the support of the wife, and should decently respect its own authority, and asks the aid of that tribunal to practically nullify its decree, to abandon its humane purpose, to join in an indirect robbery of the husband, to pervert his allowance to an end which he never sanctioned and was not bound to sanction, and to disregard the public policy which seeks to protect wife and children from the pauper's necessity and fate; and he asks this without a pretense of special equity against the fund and solely on the basis of a hard legal right. I have only to say that I think equity ought not to give him that aid, but that having both the power and the opportunity to prevent the perversion of its purpose and to make effective and protect its own decree, it should avail itself of that opportunity and exercise that power by the simple process of refusing its assistance. Under some circumstances the court might be troubled to compel respect for its purpose and prevent a perversion of its order; but there is no such difficulty where the wrong cannot be done except by the consent and with the active participation of the court. We have a right to refuse our assistance, not merely because the equities are balanced, but because those of the defendants are superior and ought to prevail.

I can see the possibility and realize the plausible force of one criticism upon this view of the subject; and that is that there is a legal judgment which cannot be satisfied by execution, and the creditor has a right to pursue in equity the debtor's equitable assets, and the court has no right, upon some sentimental view of the subject, to withhold its aid. Exactly: all that is true: but it assumes the precise point of the dispute, that the wife's alimony is an equitable asset liable generally as property to the payment of her debts. It is property in one sense, but not in the broad general sense of the term. It is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence. And here I think we may wisely avail ourselves of one of the analogies which the

eral Term opinion has furnished for our
insurance in favor of the wife on the lif
have persistently held to be non-assigı
nmon, 26 N. Y. 9.) We determined tl
acter and purpose necessarily took from
most important characteristic of propert
ad the later case of *Baron* v. *Brummer*
listinctly held "that such policies should
ıe lien of creditors either of husband oı
ıer by the express words of the statute, a
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sferable characteristic of property as suc
ely to their lawful object and purpose
e now would convict us of error then.
ın order is in one sense a debt due and t
wife, and her property. In the same ser
bt to become due or due as to its divide
in the hands of the assured. The wl
ıment lies in steadily ignoring the quality
property and treating it as ordinary an
appellant's criticism upon this analogy is
› life insurance policies was dictated by
rested specially upon the provisions of tl
ndoubtedly true, but does not at all dist
n the present case the similar constructi
Statutes of Divorce and is derived from
r provisions. In both cases a thing whic
general and ordinary characteristics of p
by sale and liable to creditors, is taken
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aim require a restriction and limitation
eneral is not subjected. This class of c
question is not one of exemptions, but
itors to a particular fund, which fund ca
ıld have the protection of equity. It do
ver the view we have taken of the dut
case to appeal to the general law of

general duty of the court in respect thereto. The question concerns a species of property of a peculiar and specific character; created and existing for one purpose only, and whose express limitations take it out of the general rule.

The doctrine which I have here invoked, that a court of equity, when applied to for its active assistance in the enforcement of a claim founded upon a bare legal right, will refuse its aid where granting it would work injustice, or would impose conditions calculated to mitigate or remove the injustice, has been repeatedly asserted under the old law which permitted the husband to reduce to his possession and become the owner of the wife's personal property. In such cases equity, not denying the legal right, has yet invariably limited and qualified it by recognizing and protecting the wife's equity, not only against the husband, but against his assignee or judgment creditor. In *Smith* v. *Kane* (2 Paige, 303), the chancellor did not hesitate, where the wife's property was less than was needed for her support, to refuse relief entirely and dissolve the injunction. This class of cases are pertinent only upon the right of the court to withhold its aid where the legal claim, however valid, is wielded to effect a wrong. The equity of the husband in the present case to prevent a perversion of his allowance to an unlawful purpose is entirely clear; that of the wife to receive it under the decree for the specific purpose which led to its award, I think also should prevail over the creditor's claim. During the marriage he had no right, legal or equitable, against her support furnished by the husband, and after its dissolution, without her fault, she ought not to be put in a worse condition. When to these equities are added the duty of the court to control and make effectual its own decree, and the public policy in which its provision is founded, it seems to me that no doubt is left as to the right of the court to dismiss the creditor and refuse him the relief he asks.

The judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.

ATHAN BOHM et al., Respondents, *v.* THE M
ELEVATED RAILWAY COMPANY et al., App

PETER SOMERS, Respondent, *v.* THE SAME, A

here, in an action to restrain the operation of an ele
city street in front of plaintiff's premises, the defends
ay the permanent or fee damages in lieu of an injuncti
o be allowed are such and only such as would be given
or condemnation of lands for railroad purposes.
e rule of damages in condemnation proceedings is the
and taken, at the market price, with no deductions
whatever; and as to the land remaining, if it appears th
e depreciated by the proposed use, this depreciation
s part of the consequential damages suffered.
abutting owner, by reason of his situation, has certain
eges in a city street termed easements, which are ap
and, and are a species of property The beneficial enj
asements is interfered with by the erection and operatio
ailroad in the street This interference is a taking of
nd entitles the owner to payment therefor, and in addi
lone his adjoining land.
, however, these easements are of no value in and of t
ated from the land, the real and only damage, if any,
wner in any particular case is a consequential one, *i. e.*
luced upon his abutting land
e question is simply as to the actual result upon the l
. *e.*, has the actual market value been decreased by the
t prevented an enhancement in value greater than has ac
nd if so, to what extent? The damage defendant ma
ay is the difference between the actual market value of
nd what it would have been worth if the railroad ha
ther property, *i. e.*, the easements.
here, therefore, it appears that there has been neither a d
or any prevention of an increase caused by the railr
ntitled only to nominal damages.
also, *it seems*, where it appears that the plaintiff's ab
ctually increased in value, unless it is shown that but
he defendants in taking the easements, it would have g
n value, no damage is proved.
is not essential to show that plaintiff has received be
aking special and peculiar to his land, not shared in ge
butting owners.

Statement of case.

Accordingly *held*, as it appeared by the uncontradicted evidence that there was an increase in value of all the lands abutting on the street, including plaintiff's, since the construction of defendants' road, and that the road largely caused the increase, an allowance of substantial damages was error.

Also *held*, the fact that other property in the vicinity of plaintiff's and in the side streets had been more than proportionally increased in value by reason of defendants' road, was not material.

Francis v. *Schoellkopf* (53 N. Y. 152), distinguished and explained.

In such an action the uncontradicted evidence showed, and the defendants' counsel requested the court to find, that the existence and operation of the railroad had greatly increased the population of the locality in which plaintiff's property is situated, and has brought traffic into the street, and thereby plaintiff's property has been incidentally benefited, and that there has been a general rise in the value of the real estate along the street, largely attributable to the road. The court refused so to find, and defendants excepted. Defendants also moved for a dismissal of the complaint on the merits, upon the ground, among others, that it appeared plaintiff's property had been benefited by the road, and had, by reason thereof, increased in value since its erection, which motion was denied and exceptions taken. The court found that plaintiff had sustained damage to an amount stated. *Held*, that the exceptions were sufficient to bring up the question as to whether the court had adopted the proper rule of damages.

(Argued December 8, 1891; decided January 20, 1892.)

APPEAL in each of the above-entitled cases from a judgment of the General Term of the Superior Court of the city of New York, entered upon an order made the first Monday of February, 1891, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

These two cases were argued together as involving the same questions.

The plaintiff Somers was the owner by conveyance to him in March, 1882, of certain premises known as numbers 2271 and 2273 on Second avenue in that city, and between One Hundred and Sixteenth and One Hundred and Seventeenth streets. He alleged that the defendants had unlawfully interfered with, trespassed upon and illegally taken his easements (or some portion thereof) of light, air and access to his prop-

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ach avenue. He demanded judgi
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April first, the plaintiff erected
aluable brick buildings, and to thei
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1, 1883, the elevated railway stru
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of defendants in depriving the pla
al use and enjoyment of his easem

April, 1883, to the time of trial,
of plaintiff's premises has been r

Statement of case.

one hundred dollars, and the plaintiff has sustained a loss thereby to that amount. The damage is of a continuous character, arising from the maintenance and operation of the road by defendants. The road was opened for public use in March, 1880, and has been ever since so maintained and operated. The permanent damage caused by the operation and maintenance of defendants' road was found to be $3,000, upon payment of which no injunction was to issue. The money was only to be paid in case the plaintiff conveyed to the defendants all the rights and easements appurtenant to his lots, which had been taken by them.

In the *Bohm* case the same general facts were found, differing only as to the different lots and as to the amount of damages.

Further facts are stated in the opinion.

John F. Dillon, *Julien T. Davies* and *Samuel Blythe Rogers* for appellants. The learned trial judge decided the case upon an erroneous theory, by endeavoring to ascertain how much plaintiff would have been injured, if he had not been benefited, and by charging defendants with the constructive damage thus imagined. (*Kennedy* v. *Porter*, 109 N. Y. 526, 534; *Andrews* v. *Raymond*, 58 id. 676; *Becks* v. *Sheldon*, 48 id. 369; *Smith* v. *G. F. Ins. Co.*, 62 id. 87; *James* v. *Cowing*, 82 id. 449, 457; *McGean* v. *M. R. Co.*, 117 id. 219; *Starbird* v. *Barrows*, 43 id. 200; Laws of 1850, chap. 140, § 16; Laws of 1875, chap. 606, § 20; *In re Furman St.*, 17 Wend. 649, 670; *T. & B. R. Co.* v. *Lee*, 13 Barb. 169, 171; *In re Utica, etc., R. Co.*, 56 id. 456, 464; *People ex rel.* v. *Eldridge*, 3 Hun, 541, 543; *Henderson* v. *N. Y. C. R. R. Co.*, 78 N. Y. 423, 433; *In re W. S., etc., R. Co.*, 29 Hun, 609, 611, 612; *Drucker* v. *M. R. Co.*, 106 N. Y. 157; *In re B. E. R. Co.*, 55 Hun, 165.) The method of computing consequential damages, for which we contend, is not inconsistent with any statute, nor with the Constitution. (Laws of 1850, chap. 140, § 16; Laws of 1875, chap. 606, § 20; *Newman* v. *M. E. R. Co.*, 118 N. Y. 618; *Pond* v. *M. E. R. Co.*, 42 Hun, 567; *Uline* v. *N. Y. C. R.*

N. Y. 98; *In re B. E. R*
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Fobes v. *R., W. & O. R. R*
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. v. *Eldridge*, 3 Hun, 541, 5
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id. 63; *Henderson* v. *N. Y.*
33; *In re N. Y., L. E. & W*
155; *In re N. Y., L. & W*
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11 N. J. Eq. 106, 108; *Carp*
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Ill. 238; *O. C. R. R. Co.* v. *I*
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70 Ill. 324; *L. R. & W. R.*
In other states, benefits of no

Statement of case.

in computing consequential damage, except in obedience to the requirements of the Constitution or some statute. (*A., etc., R. Co.* v. *Burkett*, 42 Ala. 83; *Hooper* v. *S., etc., R. R. Co.*, 69 id. 529; *S. L., etc., R. Co.* v. *Anderson*, 39 Ark. 167; Code Civ. Pro. § 1248; *C. P. R. Co.* v. *Armstrong*, 46 Cal. 85; *S. F., etc., R. Co.* v. *Caldwell*, 31 id. 367; *Tebama* v. *Bryan*, 68 id. 57; *Trinity College* v. *City of Hartford*, 32 Conn. 452; *Wilcox* v. *City of Meriden*, 57 id. 120; *Whitman* v. *W. & S. R. R. Co.*, 2 Har. 514; *Young* v. *Harrison*, 17 Ga. 30; *Jones* v. *W. V. R. R. Co.*, 30 id. 43; *C. & P. R. R. Co.* v. *Francis*, 70 Ill. 238; *Page* v. *C. M. & S. P. R. R. Co.*, Id. 334; *Symonds* v. *City of Cincinnati*, 14 Ohio, 147, 173; *Brown* v. *City of Cincinnati*, Id. 541; *Cramer* v. *C. & P. R. Co.*, 5 Ohio St. 140, 145; *C., etc., R. Co.* v. *Sampson*, Id. 251, 253; *Woodfall* v. *N., etc., R. R. Co.*, 2 Swan. 422; *P., etc., R. Co.* v. *Stovall*, 12 Husk. 1; *J. R., etc., Co.* v. *Turner*, 9 Leigh, 313; *E. B., etc., R. Co.* v. *Rank*, 78 Penn. St. 454; *G., etc., R. Co.* v. *Partlow*, 5 Rich. 428; *C., etc., R. Co.* v. *Longworth*, 30 Ohio St. 108.)

Charles Gibson Bennett for respondents. Under the provision of the Constitution, as construed by the courts, and the provisions of the General Railroad Act and the Rapid Transit Act, in estimating the compensation to be made for private property taken for public use by a private railroad corporation, benefits or advantages from the proposed improvement cannot be considered or set off. (*Genet* v. *City of Brooklyn*, 99 N. Y. 296; *People* v. *Mayor, etc.*, 4 id. 419; *Rexford* v. *Knight*, 15 Barb. 627; Const. N. Y. art. 1, § 6; Laws of 1850, chap. 140; Laws of 1875, chap. 606, § 20; *Frederick* v. *Shane*, 32 Iowa, 254; *M. E. R. Co.* v. *Dominick*, 55 Hun, 198; *S. A. R. R. Co.* v. *Kerr*, 72 N. Y. 330; 104 id. 268; 106 id. 157; *Francis* v. *Schoellkopf*, 53 id. 152; *Tillotson* v. *Smith*, 32 N. H. 90; *Marcy* v. *Fries*, 18 Kans. 353; *Sanderson* v. *P. C. Co.*, 102 Penn. St. 370; *Talcot* v. *Whipple*, 7 Gray, 122; *Gile* v. *Stevens*, 13 id. 146; *Armstrong* v. *City of St. Louis*, 69 Mo. 309; *Eagle* v. *C. C. R. W. Co.*, L. R. [2 C. P.] 638.) In

rise in the value of real estate situated upon Second avenue, and this increase in value is largely attributable to the existence and operation of the defendants' railroad."

Substantially the same requests were made in the *Bohm* case. These requests the defendants state are founded upon uncontradicted evidence.

Upon a careful perusal of the evidence in the case, I think this contention is well founded. The court refused to make the findings as requested and the defendants excepted.

Motions were made by the defendants in each case for a dismissal of the complaint on the merits, because, among other grounds, it appeared the plaintiff's property had been benefited by the railroad and had increased in value since its erection and by reason thereof. The motions were denied and exceptions taken.

We think, upon the whole, that the question was sufficiently raised. It is true that exceptions are unavailing when they are taken to the refusal of a judge to find as facts matters which are merely evidence and which are immaterial. In these cases, however, we must remember that the sole question at issue between the parties upon this branch of the case was as to the proper rule to be observed in ascertaining the amount of damages the plaintiffs had sustained, if they had sustained any.

The amount of damages would be materially affected by the rule which should be observed in determining their existence. And yet in making the bare finding of the amount of damage sustained, it would not appear that any particular rule had been followed, and hence it would not appear that any erroneous rule had been adopted. It might in some cases be urged, perhaps, that there was no evidence upon which to base a finding of damage, if a correct rule had been adopted, and yet a perusal of the testimony might show some slight amount, and hence the exception would fail. The judgment might at the same time be really founded upon the incorrect rule.

There would, in almost any event, be a difficulty in determining whether a wrong rule had or had not been adopted.

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equitable relief and to prevent the defendants from operating their road unless they pay the plaintiffs the damages they will sustain from the permanent interference by the railroad with their easements of light, air and access, yet the rules upon which such damages are to be awarded are so far well settled as to enable us to say that those damages are only such as would be given in a proceeding for the condemnation of lands for a railroad use, regard being had to the different characteristics of the property to be taken in these cases.

The rule was last announced in this court in the recent case of *American Bank Note Co.* v. *New York Elevated R. R. Co.*,* not yet reported. What rule obtains in this state in proceedings to condemn the kind of property which has been taken by the defendants in these cases is now made the subject of inquiry. Generally in taking land the rule may be said to be to pay the full value of the land taken at its market price, and no deductions can be made from that value for any purpose whatever. Then as to the land remaining, the question has been to some extent mooted, whether the company should pay for the injury caused to such land by the mere taking of the other property, or whether, in case the proposed use of the property taken would depreciate the value of that which was not taken, such proposed use could be regarded and the depreciation arising therefrom be awarded as part of the consequential damages suffered from the taking. I think the latter is the true rule. (*Henderson* v. *C. R. R.*, 78 N. Y. 423, 433; *Newman* v. *R. R.*, 118 id. 618; *In re Petition Brooklyn R. R.*, 55 Hun, 165, 167.) The case of *In re Petition N. Y. Elevated R. R., etc.* (36 Hun, 427) is cited for the other rule. The question might be of great importance where there was an injury to the remaining land, but if there have been no injury, the inquiry as to the scope of the liability for damages is not material. There is no question made but that the defendants are liable to pay the full value of any property taken by them subject to no deduction whatever. How the value of the

*Ante, page 252.

particular kind of property which i
arrived at is the main, and indeed the
cases. Included in this inquiry and gro
question, shall only special benefits to
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posed benefits accruing to the property which is not taken. The defendants, so far as regards this question, make no claim of restricted liability to pay such full value.

In determining the question now presented, it is well to recur briefly to the character of the property which is taken, and the circumstances under which it has been taken.

The plaintiffs own no land in the street. Their ownership of the land is bounded by the exterior lines of the street itself. Hence when, under legislative and municipal authority, the railroad structure was built, it was supposed by many there was no liability to abutting owners, because no land of theirs was taken, and any damage they sustained was indirect only, and, therefore, *damnum absque injuria*. When the courts acquired possession of the question, and it was seen that abutting land, which before the erection of the road was worth, for instance, ten thousand dollars, might be reduced to a half or a quarter of that sum in value, or even rendered practically worthless by reason of the building of the road, it became necessary to ascertain if there were not some principle of law which could be resorted to in order to render those who wrought such damage liable for their work. It has now been decided that, although the land itself was not taken, yet the abutting owner, by reason of his situation, had a kind of property in the public street for the purpose of giving to such land facilities of light, of air and of access from such street. These rights of obtaining for the adjacent lands facilities of light, etc., were called easements, and were held to be appurtenant to the land which fronted on the public street. These easements were decided to be property, and protected by the Constitution from being taken without just compensation. It was held that the defendants, by the erection of their structure and the operation of their trains, interfered with the beneficial enjoyment of these easements by the adjacent land owner and in law took a portion of them. By this mode of reasoning, the difficulty of regarding the whole damage done to the adjacent owner as consequential only (because none of his property was taken), and, therefore, not collectible from the defendants, was overcome.

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appurtenant, and no reference to the particular agency by which the taking or interference with such easements has been accomplished should be permitted, even for the purpose of determining the damage that has been thereby caused. The pure abstraction of a curtailment or destruction of the easement must be indulged in and no effect other than such curtailment or destruction upon the property left is to be regarded. Carrying out this principle it might appear that a lot on Second avenue with its easements of light, air and access unimpaired would be worth $5,000. To deprive it in some undefined way other than by defendants, of a portion of such easements equal to the amount taken by the defendants might detract from the value of the lot $2,500. Therefore, $2,500 is the value of the easements which the defendants must pay. This is, as I have said, a pure abstraction. No such case exists or can exist. The same property cannot be taken by some other agency and by defendants at the same time. Adopting the theory of the plaintiff's counsel it can be easily seen how in fact the injustice imagined might be perpetrated. A plaintiff after proving that the damage to his property, if the easement had been taken by some process and by some person other than defendants, would upon such hypothesis have been $2,500, might be met by defendants with proof of the fact that he had sustained no damage whatever, and on the contrary, by reason of the erection of the road, he had been specially and peculiarly benefited, his property being in actual fact worth fifty or one hundred per cent more than it was before. Would there not be great injustice in awarding to such an owner $2,500 for damages which in truth he had never suffered? The separate value of light and air upon the facts existing in all these cases can in the nature of things be nothing but nominal. They must be joined to the land to be of value.

A theoretical course of reasoning may be adopted by which it could be claimed, as plaintiff's counsel urges, that the value of these easements in and of themselves is represented by the amount of depreciation in value to the adjoining land their

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ential damage to land. If the taki
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nat might have happened if somethi
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rmit a recovery of this conjectural
nount of damage which was neve
galize a mere raid upon the treasury
The real question to be considered
the abutting land. (*Newman* v.
. Y. 618.) What facts may be
quiry has not been finally decided.
In the case of *Newman* (*supra*) a
as involved and discussed and
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cided. A reference to the report
arn that fact.
That action was brought and trie
hole damage in one action which th
reason of the erection and operati
ont of his premises in Church, near
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n any benefits peculiar to his hou
e construction of the road as shown
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ary, the jury have no right to take
leration." There was an exception
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was erroneous and, therefore, the judgment was reversed and a new trial granted.

The so-called Rapid Transit Acts under which the defendants were organized, provided that the commissioners of appraisal should not in determining the amount of compensation make any allowance or deduction on account of any real or supposed benefits which the party in interest may derive from the construction of the proposed railroad. The case of *Newman* decides that this provision does not mean that in examining the question whether injury has resulted to the abutting owner's remaining land by reason of the taking of a portion of the easements spoken of, the court cannot regard the fact that so far from injury the land remaining had been specially enhanced in value by reason of the taking. On the contrary it decides that such fact, of special enhancement in value, is material and may and must be considered upon the question of damage. It is not offsetting injury against benefits. It is discovering whether in reality there has been any injury to the remaining land. To prove that the land has been specially benefited may be proof that it has not been diminished in value. If it would have increased still more in value but for this taking by the road, that difference it must pay because to that extent there would be damage. The *Newman* case is authority for the proposition that the easements are only of nominal value in and of themselves, and that the result of taking them must be looked for in the effect upon the adjoining land. If instead of loss or injury that land has been specially benefited by the taking by the railroad company, then no damage has been sustained by the land owner. Although adding nothing to the weight of the authority of the *Newman* case I must say that as far as it goes the decision receives my unqualified approval. The remarks of the learned judge in the latter part of the opinion as to general benefits from the growth of the city, etc., were no part of the decision itself and were merely suggestions as to matters not really involved in the case. They raise the question as to how far general benefits to the land may be regarded and also whether

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lot owner has been injured to the extent of a farthing? The absence of injury may have been the result of the general growth of the city by reason of which the particular property has grown in value with the rest of the city. It is the fact, not the cause, which is material. Where it appears that the property left has actually advanced in value, unless it can be shown that but for the act of defendants in taking these easements it would have grown still more in value, the fact is plain that it has not been damaged.

It is said the lot owner himself is entitled to the benefits accruing to him from the general rise of property caused by a general growth of the city in that vicinity, and that the causes of such growth are too indefinite, and uncertain, and problematical to permit the railroad to take advantage of it upon the question of damages. Of course, the lot owner is entitled to the benefits arising from these sources. I propose to take no course which shall rob him of them. None other ought to or in fact can have them. It is not a question of permitting the lot owner to have these benefits. How is he despoiled of them when upon an inquiry whether he has sustained damage from the conduct of the defendants it clearly appears that he has not? If it appear that he would have sustained damage but for the fact that the general growth of the city in that direction prevented it and caused an increase in value, what materiality lies in the fact that this growth was not caused by the railroad? As I have already remarked, the fact that there has been no damage, is the material fact, and not the reasons which in truth prevented the injury from occurring. If it did not occur, then clearly the lot owner has suffered nothing. He receives all the benefits attaching to the general growth of the city which causes the enhancement in value of his own lots, but he is not permitted to recover from defendants alleged damages which, in fact, he has never sustained.

In the other view, what is to be the rule or measure of damages which is to prevail? Is the owner to be permitted to recover as damages the amount which it is guessed at or surmised he would have sustained by the depreciation in value

in these cases. It is, however, abundantly dence actually given, that the property of suffered injury or damage by the wrongful ants, and where the plaintiffs have in fact is no hardship which prevents their recover defendants. The plaintiffs, upon a new tri view of the rule of damages may, perhaps they have nevertheless suffered damages fro of the defendants. It is only necessary for decide that if the property of the plaintiffs value since the taking of these easements or and if such increase is largely due to the b tion of the defendants' road, and if such i have been greater but for the action of de plaintiffs have suffered no damage. Whetl common to every other owner in the avent proportion with some owners of property than with the plantiffs, are matters of no plaintiffs are not damaged because their neig to an even greater extent than they are l road.

It is not necessary to refer to the adj states upon this subject. This is a matte must be controlled by our own views of th own laws and of what is consistent with a p of them.

It is, too, a work of supererogation to cite separately, the various cases decided in th of our own state during the last forty years of damages in condemnation proceedings familiar with them and their conclusions an not depart from the general trend thereof i own views in these cases now before us. (*supra*) stands as authority for the principl must proceed in our examination of the qu of these easements.

Upon the further question as to the c

Opinion of th

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THE NEW YORK, LAKE ERIE AND WESTERN R COMPANY, Appellant, *v.* THE ATLANTIC REFIN PANY, Respondent.

While a railroad company as a carrier of passengers owes passengers and also to its employes of active diligence tc from danger, as to a stranger, it owes him no such duty, ei him from danger, or in any way to anticipate and so, avo quences of his own negligence.

In an action to recover damages alleged to have bee the negligence of defendant, the following facts appea transported for defendant a carload of lumber; it was kept the car by stakes placed in sockets at the sides, suppor nailed to the tops of the stakes and extending across the lum was delivered to defendant upon a siding alongside of pl track. Defendant's agent, in order to unload the lumber the cross-pieces, removed a large portion of the lumber, le narrow pile on the side toward the main track, and without the cross-pieces, left the car over night. During the nigh arose and the lumber fell from the car and upon the The engineer of a train approaching thereon, as soon as the obstruction, applied the air-brakes, but before th be stopped, it struck the lumber and the locomotive a broken and damaged. *Held*, that the evidence justified a fi ligence on the part of defendant; also, that plaintiff was contributory negligence; that it owed defendant no du or superintend the unloading of the car, or to watch it the night after it arrived, and was not bound, as between ant, to anticipate any danger from the lumber after its deli the right to run its trains on the assumption that defenda negligently permit the lumber to be placed or come up

Defendant offered to prove that plaintiff kept no watchman this was objected to and excluded. *Held*, no error; as pla bound to keep a watchman there.

Defendant offered to prove that the car used for transporting a flat car and not a lumber car with sides boarded part w rejected. *Held*, no error; as the lumber was safely tra delivered and fell from the car, not from any imperfecti from the careless manner in which it was left.

(Argued December 15, 1891; decided January 20, 1892.)

APPEAL from order of the General Term of th Court in the first judicial department, made Ma

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Statement of case.

mostly from the side of the car away from the main track, and taking out a number of pieces from the middle or under part of the load, thus leaving the lumber on the car in a high, narrow pile next to the plaintiff's main track, without putting back the cross-pieces which formed the chief support of the stakes. The defendant's agents went away and left the car over night. During the night, between eight and eleven o'clock, there was a storm of wind and rain, and before the plaintiff's train reached the spot, the lumber fell, or was blown from the car upon the main track, and the accident was thus occasioned. The plaintiff brought this action to recover the damages it sustained from the accident, alleging that the lumber came upon its track through the negligence of the defendant. The plaintiff recovered a verdict at the Circuit.

Further facts are stated in the opinion.

Charles Steele for appellant. The question as to defendant's negligence was correctly disposed of. (*Chapman* v. *A. R. Co.*, 38 Hun, 667; 108 N. Y. 638.) Evidence as to the kind of car used was properly excluded. (*Newson* v. *N. Y. C. R. R. Co.*, 29 N. Y. 383; *Gordon* v. *G. S. R. R. Co.*, 40 Barb. 550; *Ernst* v. *H. R. R. R. Co.*, 35 N. Y. 9, 27, 28; 2 Thomp. on Neg. 1151, 1172, § 18; 1 S. & R. on Neg. 141, § 92; *Brown* v. *Lyman*, 31 Penn. St. 510; Beach on Cont. Neg. 22, § 9; *T. R. R. Co.* v. *Munger*, 5 Den. 255; Whart on Neg. §§ 323, 324, 349; *Larmore* v. *C. P. I. Co.*, 101 N. Y. 391; *Splittorf* v. *State*, 108 id. 205; *Donahue* v. *State*, 112 id. 142; *Cusick* v. *Adams*, 115 id. 55; *A. & E. R. R. Co.* v. *Baldwin*, 60 Md. 88; *H. & S. J. R. R. Co.* v. *Kenny*, 41 Miss. 272; *Sinram* v. *P. & F. W. R. R. Co.*, 28 Ind. 244; *R. R. Co.* v. *Skinner*, 19 Penn. St. 298; *Schoonmaker* v. *McNally*, 3 Hun, 415; *Beisiegel* v. *N. Y. C. R. R. Co.*, 34 N. Y. 622, 628, 632; 40 id. 9; 1 S. & R. on Neg. §§ 86, 125; Beach on Cont. Neg. 19–21, 35, 37, § 11; Cooley on Torts, 69; *Lannen* v. *A. G. L. Co.*, 44 N. Y. 459; *Lanigan* v. *N. Y. G. Co.*, 71 id. 29, 33; *Weber* v. *N. Y. C. R. R. Co.*, 58 id. 451, 458; *McGrath*

Opinion of the Court, per EARL, J.

R. R. Co. v. *Munger*, 5 Den. 255; *Sanford* v. *E. A. R. R. Co.*, 23 N. Y. 343; Cooley on Torts, 674; *T. H., etc., Co.* v. *Graham*, 45 Ind. 286; *Ruter* v. *Foy*, 46 Iowa, 132.)

EARL, J. Chapman, the engineer upon the plaintiff's engine at the time of the accident, was severely injured, and he brought an action against the defendant to recover for his injuries. His recovery was sustained in the General Term and in this court. (38 Hun, 637; 108 N. Y. 638.) In that action it was finally determined in this court that there was sufficient evidence of the defendant's negligence to uphold the plaintiff's recovery. Upon the trial of the action which resulted in the judgment now under review, the plaintiff called no witnesses, but by consent read the evidence given on behalf of the engineer in his action, and most of the defendant's evidence was also read as it was given in that action. Thus, the evidence given on the trial of this action is substantially the same as that given upon the trial of that action.

Without, therefore, further examining the evidence, we may properly hold that the negligence of the defendant was sufficiently established, and proceed to the main contention now made on its behalf, that there was contributory negligence on the part of the plaintiff which forbids its recovery. It was upon this ground that the judgment entered upon the verdict was reversed by the General Term.

This carload of lumber was transported by the plaintiff and placed upon the side track for the defendant, and there it received the delivery of the lumber. At the time of its delivery, it was in a safe condition on the car, properly loaded and fastened. If the defendant had removed all the lumber from the car on that day, as it undoubtedly could, no accident would have happened. And if, as the jury must have found, after removing a part of the lumber, it had left what remained on the car properly loaded and fastened, no accident would have happened. But because of negligence attributable to it, and solely because of that, the lumber in some way and from some cause fell from the car upon the main track and

case of contributory negligence on the part of the pl
which shielded this defendant from liability for the
quences of the accident. The plaintiff was not bound to
a watchman at this side track; hence the trial judge comm
no error in refusing to admit the defendant's proof th
watchman was kept there. Neither did the trial judge
refusing to allow the defendant to prove that the car
the plaintiff furnished to it for transporting the lumbe
not a lumber car, boarded up part of the way around the
but a flat car. The lumber was transferred in safety t
side track, and when delivered was safely fastened on th
and it fell from the car, not from any imperfection in th
but from the careless manner in which the lumber w
upon the car after a portion of it had been removed b
defendant.

The following requests to charge, made on the part
defendant, were properly refused: "If you find that th
dent occurred through the negligent omission to foresee
the lumber was not left in a condition to withstand a
then the plaintiff is equally negligent." "If you find th
accident occurred through any negligent omission of pl
to have a track walker, a person in charge of the trac
verdict should be for defendant." "Plaintiff was bou
keep its tracks in a safe condition." "Plaintiff was bou
see that this car was in a safe condition over night." "
tiff had the custody of this car over night." "If yo
that this car was over night in the custody of the railroa
pany, the defendant is not liable." And the following p
of the judge's charge which is complained of by the d
ant, and which the General Term held to embody erro
think contains an accurate statement of the law applica
this case: "I have already stated to you that the negl
upon the part of the railroad company in not having a
man, upon the track if you please, or in running its eng
a high rate of speed, or anything of that kind, has noth
do with the question of absolving these defendants from
liability. The plaintiffs were not bound to assume that

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ET CROSDALE, Respond
App

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licensor; and this, althoug
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the license.

Statement of case.

Such a license, therefore, may not be changed into an equ
the ground of equitable estoppel.

Equity will only enforce a parol contract for an interest in
contract is definite and certain in all its parts.

In an action to restrain defendant from tearing down a wal
his land by plaintiff under an alleged parol license, it ap
parties owned adjoining city lots. In grading his lot pl
embankment along the line between the two lots. Defen
in grading his lot, excavated the earth up to said li
embankment. In an interview between the parties pla
defendant to sell him two feet of his land to build a wall
ant declined at the time, but subsequently wrote plaintl
decided to give him the two feet asked for. Plai
built the wall, and his attorney demanded a deed o
Defendant declined to execute a deed on the ground t
agreed to give a deed and that the wall was not built a
understanding, and gave notice that he intended to tear
trial judge decided in favor of plaintiff, on the ground
when executed became irrevocable. *Held*, error.

(Argued December 18, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of
Court in the fourth judicial department entered
made February 3, 1891, which affirmed a judgm
of plaintiff entered upon a decision of the cou
Special Term.

The nature of the action and the facts, so far as
stated in the opinion.

Lawrence T. Jones for appellant. The trial c
holding that it was immaterial whether or not plair
an artificial embankment, raising the earth several f
natural surface along the boundry line of his own
west of defendant prior to any excavating done b
(Washb. on Eas. [4th ed.] 580, 600; *Thurston*
12 Mass. 226; *Farrand* v. *Marshall*, 19 Barb.
v. *Holbrook*, 4 Paige, 169; *Radcliff* v. *Mayor*,
195; 1 Add. on Torts, 84; *Losee* v. *Buchanan*, 5
The proposition stated in the opinions below to tl
defendant is estopped from interfering with the

Opinion of the Court, per ANDREWS, J.

M. M. Waters for respondent. The fraud which would be the result of permitting defendant to remove the wall after inducing the expenditure, receiving and enjoying the benefit thereof, etc., necessarily entitle a court of equity to prevent the defendant from depriving the plaintiff of the benefit of the expenditures made on the faith of the defendant's promise. (*Stewart* v. *Ahrenfelt*, 4 Den. 189; *Farrand* v. *Marshall*, 21 Barb. 409; *Smith* v. *Smith*, 4 N. Y. Supp. 669; *Freeman* v. *Freeman*, 43 N. Y. 34; *Rhyman* v. *Gillis*, 57 id. 68.) The evidence is amply sufficient to identify the wall built and its location and dimensions with "the two feet you asked to build your wall on," specified in the letter. (Fry on Spec. Perf. [3d ed.] 158.) The Statute of Frauds is not available as a defense. (*Farris* v. *Walton*, 107 N. Y. 398; *Rindge* v. *Baker*, 57 id. 206; *Freeman* v. *Freeman*, 43 id. 34.)

ANDREWS, J. This case presents a question of importance from the principle involved, although the particular interest affected by the decision is not large.

The action was brought to obtain equitable relief by injunction to restrain the defendant from tearing down a stone wall erected on the defendant's land by the plaintiff, under an alleged parol license from the defendant, and in the erection of which the plaintiff expended in labor and materials a sum exceeding one hundred dollars. The parties are the owners of adjoining lots fronting upon a public street. The plaintiff's lot is west of the lot of the defendant. The land in its natural state descended toward the east. In 1886 the plaintiff graded his lot, and in so doing, raised an embankment several feet high along his eastern line, adjacent to the lot of the defendant, and erected a house on his lot. In 1887 the defendant graded his lot and excavated the earth up to his west line, adjacent to the embankment on the plaintiff's lot, to the depth of four or more feet, thereby removing the natural support to the lot of the plaintiff as it was in its original state. Before the defendant had completed his excavation, the parties had an interview and the question of the

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The plaintiff thereupon
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his mind, and he built the wall of "flat, ordinary building stone, not hewn into shape and not packed into regular courses, nor dressed at all," and without mortar or cement. The wall was ninety feet in length, two feet or less in width, and four to six feet high. It does not appear that the defendant saw the wall during the course of its construction, except that he was upon the lot on one occasion when the foundation was being laid, nor does it appear that he knew that the wall was to be laid up loose, or at any time consented to the erection of such a wall as was constructed. Within two weeks after the wall was completed he notified the attorney for the plaintiff, who, at the request of his client, had written him, demanding a deed of the two feet, that he had not agreed to give a deed, and that the wall was not built according to the understanding, and that he intended to tear it down.

This case was tried and decided upon the theory that the plaintiff had a license from the defendant to build the wall on his land, which, when executed, became in equity irrevocable. It was not claimed on the trial, nor is it now claimed, that there was any contract on the part of the defendant to sell the land occupied by the wall to the plaintiff, which, by reason of part performance, equity will enforce. The claim and the finding is that the license to enter upon the defendant's land, when acted upon by the plaintiff, conferred upon him a right in equity, in the nature of an easement, to maintain the wall on the defendant's lot. If this claim is well founded, there has been created, without deed and in violation of the Statute of Frauds, an interest in the plaintiff and his assigns in the land of the defendant, impairing the absolute title which he theretofore enjoyed, and subjecting his land to a servitude in favor of the adjacent property. It is quite immaterial in result that this interest claimed, if it exists, is equitable and not legal. An encumbrance has been created upon the defendant's lot, and his ownership, to the extent of such interest, has been divested.

We are of opinion that this judgment is opposed to the rule

of law established in this state. There has
trariety of decision in the courts of different
dictions. But the courts in this state have u
steadiness the general rule that a parol licen
the land of the licensor, while it justifies any
licensee before revocation, is, nevertheless,
option of the licensor, and this, although the
confer a continuing right and money had be
the licensee upon the faith of the license. T
rule of the statute. It is also, we believe, f
by public policy. It prevents the burdeni
restrictions founded upon oral agreements,
stood. It gives security and certainty to title
important to be preserved against defects a
not founded upon solemn instruments. Th
courts to enforce oral contracts for the sale o
defined and well understood, and is indisputab
what commenced in a license into an irrevoca
ground of equitable estoppel, is another ai
matter. It is far better, we think, that th
interests in land to be evidenced by deed, sho
than to leave it to the chancellor to cons
license as a grant, depending upon what, in h
equity in the special case. There are severa
the present case which render the enforcemer
diction a dangerous precedent. The only
contained in the letter of April thirteenth.
"I have decided to give you the two feet y
build your wall on." How far the wall w
character, or how it was to be built, is not st
to the previous interview to which the letter
dence of the plaintiff of what was said at the
the whole matter indefinite and uncertain.
neither the description, dimensions and cha
posed wall were spoken of. The testimony
is to the contrary, but perhaps it is to be
trial judge adopted the testimony of the plain

Opinion of the Court, per ANDREWS, J.

Upon the case made by the plaintiff upon the letter
prior conversations, if it was a case of contract, it is diff
see how it could be enforced in equity. The cases are
that equity will only enforce a parol contract for an
in land when the contract is definite and certain in
parts. The extent of the injury which will be suffered
equity intervenes is also an element to be considered w
extraordinary jurisdiction is invoked. Here the
expended by the plaintiff in reliance upon the licen
comparatively small. The most reasonable inference
the plaintiff confided in the good faith of the defendan
security that the wall would be permitted to remain.
not appear that anything was said as to the time it sh
maintained. It is claimed that the wall was built for th
fit of both parties. This is founded on the assumpti
the defendant's excavation removed the natural suppor
plaintiff's land, and subjected him to liability. But thi
not take the case out of the statute nor authorize th
ference of equity to enforce the license as a grant in
The same element of common benefit is found in the
Cronkhite v. *Cronkhite* (94 N. Y. 323).

The trial judge refused to find the facts as to the
which would have followed from the defendant's exc
in case the plaintiff's land had continued in its natural sta
tried and decided the case on the theory that the licens
executed became irrevocable. In this we think he
The cases of *Mumford* v. *Whitney* (15 Wend. 380)
man v. *Lucksinger* (84 N. Y. 31) and *Cronkhite* v. *Cr*
(*supra*) are, we think, decisive of this action.

The judgment should be reversed.

All concur.

Judgment reversed.

ohn B. McSherry, Respondе
Village of Canani

nder the act of 1854 (§ 1, chap. 86
powers and duties of the trustees"
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walks became absolute, like that of c
of this enlarged jurisdiction they we
corresponding duties, and the respon
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ccordingly *held*, that the village was
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grating in a sidewalk, through whic
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was "the street commissioner of t
evidence showed, to superintend an
Held, that notice to him was sufficie

(Argued December 21, 1891; decide

Appeal from judgment of the
ourt in the fifth judicial depar
ade January 23, 1891, which
f plaintiff entered upon a ve
otion for a new trial.
The nature of the action and
ated in the opinion.

Edwin Hicks for appellant.
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chapter 352 of the Laws of 1
on to the village of Canandaig
id duties of the trustees of s
ap. 426; Laws of 1851, chap.
Penn Yan, 5 Lans. 352; *W*
29; *Mayor, etc.*, v. *Cunliff*, 2
g, 51 Barb. 396; S. & R. on
rustees of Medina, 27 Barb. 21

Statement of case.

32 id. 634; *Hunt* v. *City of Brooklyn*, 36 id. 226.) It appears in this case that the corporation was not instrumental in placing the grate in the walk, nor did it give the owner any permission to place it there. It was done by the owner for his own convenience and for the convenience of his tenants. (*Dixon* v. *B. C. & N. R. R. Co.*, 100 N. Y. 171.) The trustees had no notice, either actual or constructive, of any defect in the sidewalk, and without such notice no liability attaches. (*Griffin* v. *Mayor, etc.*, 9 N. Y. 456; *Smith* v. *Mayor, etc.*, 66 id. 295; *Cain* v. *City of Syracuse*, 95 id. 83; *Hart* v. *City of Brooklyn*, 36 Barb. 226; *Peach* v. *City of Utica*, 10 Hun, 477; *McDermott* v. *City of Kingston*, 19 id. 198; *Bush* v. *Village of Geneva*, 3 T. & C. 409; *Hume* v. *City of New York*, 47 N. Y. 639; *Hunt* v. *City of Brooklyn*, 35 Barb. 226.) The trustees are the only officers who represent the village of Canandaigua as to its streets and sidewalks, and no notice of a defect or obstruction in a street of the village, except to the trustees, would be notice to the defendant. (Laws of 1815, chap. 254, § 2; Laws of 1847, chap. 426, §§ 25, 77.) The existence of a defect in a public street, in consequence of which a traveler sustains injury, does not, of itself, establish a breach of duty on the part of the village. (*Hunt* v. *Mayor, etc.*, 109 N. Y. 134, 140, 141; *Jenney* v. *City of Brooklyn*, 120 id. 164; *Ring* v. *City of Cohoes*, 77 id. 83; *Hart* v. *City of Brooklyn*, 36 Barb. 226; *Requa* v. *City of Rochester*, 45 N. Y. 129, 135.) The notice must be an express notice or the defect must be so apparent and notorious and have existed for so long a time, that the proper officers of the village might, by its appearance, have observed the defect in time to have had it remedied. (*Todd* v. *City of Troy*, 61 N. Y. 506, 509; *Smith* v. *Mayor, etc.*, 66 id. 295; *Requa* v. *City of Rochester*, 45 id. 129–139.) The defendant had no notice of the defect complained of prior to the accident. (*Requa* v. *City of Rochester*, 45 N. Y. 129, 134; *Todd* v. *City of Troy*, 61 id. 506; *Smith* v. *Mayor, etc.*, 66 id. 295; *Hunt* v. *Mayor, etc.*, 109 id. 134, 141; *Griffin* v. *Mayor, etc.*, 9 id. 456; *Dwight* v. *G. L. Ins. Co.*, 103 id. 341.) If the defendant could be charged with

constructive notice of the defect and
thereon, then the plaintiff is guilty of c
and is not entitled to recover for the all
v. *City of Troy*, 83 N. Y. 514; *Griff*
456; *Dubois* v. *City of Kingston*, 102 i
113 id. 378, 384, 385; *Cordell* v. *N. Y.*
75 id. 330; *Young* v. *N. Y., L. E. &*
500.)

Frank Rice for respondent. In de
defendant might be charged with no
and other facts, actual information o
walk given to the street commissione
which the jury had the right to conside
the evidence was properly received.
Inst., 37 Hun, 349–351; *Peach* v. *City*
McDermott v. *City of Kingston*, 19
which appears, showing plaintiff's con
married or single, was properly receive
17 Hun, 34.) The evidence of physica
petent for any purpose, except to sh
gence. It was not offered for this pur
94 N. Y. 621; 2 S. & R. on Neg. [4th
City of Utica, 10 Hun, 477–480; *D*
37 N. Y. 568–573; *Stewart* v. *Ripon*,
competent for Dr. McClellan, the at
state, from his observation, whether the
pain during the time he treated him fo
locher v. *C. S. & B. R. R. Co.*, 99 N
Murphy, 11 id. 416; *Werely* v. *Perso*
son v. *N. Y. C. R. R. Co.*, 35 id. 487;
R. Co., 30 Hun, 437; 100 N. Y. 6
nonsuit was properly denied. (*Conrad*
16 N. Y. 158; *Storrs* v. *City of Utica*
City of Lockport, 50 id. 236; *Saulsbur*
94 id. 27; *Kunz* v. *City of Troy*, 1
Village of Canisteo, 100 id. 89; *Todd*

506; *Peach* v. *City of Utica*, 10 Hun, 477, 479; Laws of 1854, chap. 352, § 1; Laws of 1864, chap. 257, § 1; *Clifford* v. *Dam*, 81 N. Y. 52; Laws of 1866, chap. 597, § 4; Laws of 1853, chap. 602, § 1.) The charge to the jury by the court was correct. (*Childs* v. *West Troy*, 23 Hun, 68; *Deyoe* v. *Saratoga*, 3 T. & C. 504; *Rehberg* v. *City of New York*, 91 N. Y. 137; *Twogood* v. *City of New York*, 102 id. 216; *Higgins* v. *Village of Salamanca*, 6 N. Y. S. R. 119; 1 Dillon on Mun. Corp. §§ 146, 207, 242, 305; Laws of 1884, chap. 308; Laws of 1874, chap. 628; 1 S. & R. on Neg. [4th ed.] § 293.)

Gray, J. The plaintiff sued the defendants for the alleged neglect to keep a sidewalk in repair; in consequence whereof he sustained personal injuries, by a fall through a defective and unsafe grating. The defendants have appealed from the affirmance by the General Term of a judgment entered by the plaintiff, upon a verdict by a jury in his favor.

Of the points urged by their counsel I deem it unnecessary to refer to but two, and that reference may be brief, in view of the satisfactory opinion of Judge Dwight at General Term.

The appellants claim that the plaintiff should have been nonsuited; because by the village charter the trustees were under no obligation to construct or repair sidewalks. In his very elaborate brief the counsel for the appellants bases his argument, in that respect, upon a construction of the act, passed in 1815 (Chap. 254), under which the village of Canandaigua was incorporated; of the subsequent act of 1847 (Chap. 420), constituting the village a separate road district, and of those provisions or sections of the General Village Incorporation Act of 1847 (Chap. 426), which were adopted by the village electors in 1848. In my judgment we are not called upon, and it seems unnecessary, to follow him in that argument, or to pass upon his interpretation of these laws. Whatever may have been the limitations upon the administrative powers and duties of the village trustees, with respect to the making and repairing of streets or sidewalks, the subsequent enact-

ıpter 352 of the Laws of 18
o have so far enlarged these
.e away with the restrictior
ıich may previously have e
ither to undertake such worl
the act of 1854 is "An act
andaigua and enlarging the
of said village." Section
rustees of the village of Can
of highways in and for said
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power to regulate, repair
idewalks * * * in said
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the Village of Ithaca, 16
of Ithaca, 94 N. Y. 27.)
negligence of the trustees t
e suit of an injured party.
ability so devolving rests ir
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imposed, in consideration of the investiture of the trustees by the legislature with the grant of the wider power. This obligation, obviously, inures to the benefit of every party interested in its fulfillment. The action, therefore, was maintainable, if there was notice of the existence of the defect. There was evidence that one Homer Chase was employed by the trustees to superintend and examine the streets and sidewalks, and the admission was formally made of record that Chase was "the street commissioner of the village of Canandaigua at the time of the accident to the plaintiff, and had been since January 1, 1888." There was evidence, further, to show that notice of the dangerous condition of the grating had been given to Chase some time prior to the accident. Whether he was *de facto* or *de jure* street commissioner becomes immaterial, under the facts of the case, and if the jury found that there was notice to him, it was sufficient notice to the corporation of the existence of the defect complained of.

The other questions raised by the appellant's exceptions in the case have been considered, but none are of sufficient importance to call for discussion here.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MEMORANDA

OF

Causes Decided During the Period Embraced in this Volume, Which Are Not Reported in Full.

GEORGE MUNRO, Respondent, *v.* FRANK TOUSEY, Appellant.

THIS case presented the same question and was argued and decided with *Munro* v. *Tousey* (*ante*, page 38).

MAYER ALTMAYER, Respondent, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY et al., Appellants.

(Argued October 13, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 9, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Julien T. Davies for appellants.

Henry T. Atwater for respondent.

Agree to affirm; no opinion.
All concur, except EARL, J., not voting.
Judgment affirmed.

GEORGE E. STERRY, Respondent, *v.* THE NEW YORK ELEVATED RAILROAD COMPANY et al., Appellants.

(Submitted October 15, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made March 12, 1891, which affirmed

a judgment in favor of plaintiff entered up
referees.

This action was brought to restrain defe
ating its elevated railroad in the street in f
premises and for damages.

The following is the memorandum of opi

"The plaintiff purchased the premises in
several years after the construction of the ra
the defendants claim that he is not entitled
on account of the maintenance and operatic
Our decision in *Pappenheim* v. *Metropolita*
way Company (128 N. Y. 436), is an answe

"The defendants further claim that the
entitled to any rental damage, because the
the possession of his tenants. To this clain
Kernochan v. *N. Y. Elevated Railroad*
Y. 559), is an answer.

"The judgment should be affirmed, with

Julien T. Davies and *J. C. Thomson* for

John A. Weeks, Jr., and *Henry A. Fors*

Per Curiam opinion for affirmance.
All concur, except EARL, J., not voting.
Judgment affirmed.

MICHAEL O'BRIEN, Respondent, *v.* ROB
Appellant.

(Argued October 15, 1891; decided December 1, 1

APPEAL from judgment of the General Te
Court in the first judicial department, ente
made at the February term, 1891, which af
in favor of plaintiff entered upon a verdi
court.

Simon W. Rosendale for appellant.

Edward W. S. Johnston for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

JOSEPH WOERMAN, Respondent, *v.* BEREND BAAS, Executor, etc., Impleaded, etc., Appellant.

(Argued October 19, 1891; decided December 1, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 6, 1891, which affirmed an order of Special Term allowing the plaintiff to discontinue the action as against the appellant.

Benjamin G. Hitchings for appellant.

Frederick W. Holls for respondent.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* THE NEW YORK CITY CENTRAL UNDERGROUND RAILWAY COMPANY, Appellant, et al., Respondents.

(Argued October 19, 1891; decided December 1, 1891.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department made June 26, 1891, which affirmed an order of Special Term denying a motion to strike out amended complaint and discontinue action.

Edward Winslow Paige for appellant.

David J. Dean for respondents.

Agree to dismiss appeal; no opinion.
All concur.
Appeal dismissed.

HARLES J. QUINBY, Respondent,
Appellant

rgued October 19, 1891; decided Dec

PPEAL from order of the Gene
rt in the second judicial depart
ch affirmed an order of Special
the clerk to tax defendants' cost

Henry Thompson for appellants.

Minott M. Silliman for respond

gree to affirm; no opinion.
ll concur.
Order affirmed.

N C. PROVOST, Appellant, *v.* Lo
Responden

rgued October 19, 1891; decided Dec

PPEAL from order of the Gen
rt in the second judicial depart
ch reversed an order of Special
t for deficiency and directing
er judgment of foreclosure here

l. *N. Weller* for appellant.

George A. Stearns for responden

gree to dismiss appeal; no opin
ll concur.
ppeal dismissed.

ASTIAN DUNCAN, Jr., Respond
UTUAL ACCIDENT ASSOCIATION O

rgued October 21, 1891; decided Dece

PPEAL from judgment of the Ge
rt of the city of New York, en

March 3, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Austen G. Fox and *George W. Sill* for appellant.

David D. Duncan for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

WASHINGTON H. TAYLOR, Appellant, *v.* CATHERINE TAYLOR, Respondent.

(Argued October 22, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Charles Wehle for appellant.

Benjamin Scharps for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

ABRAM M. ROOS, Appellant, *v.* HENRIETTA TREMPER, Respondent.

(Argued October 22, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and ordered a new trial.

W. F. O'Neill for appellant.

B. R. Champion for respondent.

o affirm order, and judgme
on stipulation; no opinion.
ur.
nt affirmed, and ordered ac

R, Respondent, *v.* THE NE
WESTERN RAILROAD COMPA

ctober 22, 1891; decided Decem

from judgment of the Gen
ie second judicial departme
ruary 9, 1891, which affirm
entered upon a verdict, an
on for a new trial.

Z. *Carr* for appellant.

P *Neill* for respondent.

o affirm; no opinion.
ur.
nt affirmed.

ON MILLS, Respondent, *v.*
, Appellants.

l October 28, 1891; decided Dec

from judgment of the Gen
ie second judicial departme
uary 10, 1890, which affirr
f entered upon a decision
rm.

P *Neill* for appellant.

ott for respondent.

o affirm; no opinion.
ur.
nt affirmed.

MARY S. EDRIDGE, Respondent, *v.* CHARLES B. KENNING, Appellant.

(Argued October 23, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court, in the fifth judicial department, entered upon an order made February 2, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

F. L. & J. E. Durand for appellant.

Theodore Bacon for respondent.

Agree to affirm on opinion below.
All concur.
Judgment affirmed.

MILO HOWELL, Respondent, *v.* THE JOSEPH EDWARDS DREDGING COMPANY, Appellant.

(Submitted October 27, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 11, 1891, which affirmed a judgment in favor of plaintiff, entered upon a verdict and affirmed an order denying a motion for a new trial.

Alfred Jaretzki for appellant.

Hatch & Warren for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

MEMORANDA

RLES V. WHITTEN et al., Appel
·WATER, Respon

e a trial court makes an erroneous cha
or, must be clear and not left to be argu
ling with a different question.
ho was insolvent, ordered certain goo
rch, 1884, which were received and acce
the twenty second of that month G.
nt Upon the trial of an action to reco
.ch plaintiff claimed were purchased b
olvency and with the preconceived des
rt in its charge treated the order as the
question was the intent of G at th
uested a charge that notwithstanding
en he made the purchase, if when he re
reasonable cause to know, he could
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harge, saying "the intent must be a
le" *Held*, error.

gued October 27, 1891; decided Decem

PPEAL from judgment of the Gene
t in the fifth judicial departmen
e October 23, 1890, which affirm
efendant entered upon a verdict
ing a motion for a new trial.
his action was brought to recover
been purchased by David C. Gr
aintiffs, with intent not to pay f
he following is the opinion in ful
The question of fact in this ca
nt. The property in controversy
plaintiffs on March 7, 1887, by
eir agent on that day. The go
n and received and accepted by G
l and made a general assignmen
nty-second of the same month.
her the purchase was made with
goods, and it was submitted to th
ge in this language: 'Whether n

1887, at the time the agent made the sale, did Gray pu these goods intending not to pay for them.' The inten assignor on March seventh was the question submitted giving of the order was treated as the 'purchase' by the purpose and design of which was to be ascertained. that preliminary statement of the question the learn judge added: 'If, when he purchased the goods, I c what his financial condition may have been, if he believ he could do as he had been doing in the past, get some discount and carry his notes, and that he could pay fo goods, I say, if he honestly purchased them, believing time that he could continue his business in the future as in the past, although he was insolvent, and I think it is disputed but that he was insolvent from the time h menced business, then the plaintiffs cannot recover action. On the other hand, if when he purchased the he knew that he was about to make an assignment, ar from the condition of things he could not pay for then the plaintiffs are entitled to a verdict. It is for you upon all the facts of the case, what his intention was time.' This language of the charge clearly fixed the dat purchase and the time at which the intent was to be mined as the seventh of March when the order for th was given, and the jury could not easily have unders otherwise.

"But all ground for misunderstanding was removed the plaintiffs' counsel called the attention of the court precise question of time and requested a charge 'tha the time Gray received the goods, notwithstanding w might have thought when he made the contract, he kn had reasonable cause to know, that he could not go on i ness, that he is equally chargeable with an intent not t This request was refused, the court saying: 'The inten be at the time the contract was made.' To this there exception. It is conceded that this was error, and point vital to the controversy; but the answer made that it was afterward cured by a substantial withdraw majority of the General Term founding their conclusio the disposition made of later requests. In answer to

ı the court said: ' If he knew he was
ɔn to believe he could not pay for them
ect.' The plaintiffs' counsel then asked
same proposition as a proposition of l
when he received as well as to the tir
request was declined and the plaintiff
n the attitude of the court is consisten
question of intent confined to the date
We now come to the two requests
ɔrity of the General Term rely. T
t it is not enough for Gray to say, o
jury to say, that it was perhaps unce
ld be obliged to stop payment; that i
night stop any day; he cannot be pe
nded to pay for a large bill of gooc
he eighth of March, and received si
gnment.' The court answered, 'That
jury.' The point embodied in the req
ıted sufficient evidence of the intent, a
t date the intent was to be found. Th
that the fact of insolvency followed
out the inference that the failure wa
of the purchase, and no attempt was n
e made, to change the ruling as to time.
this: 'that in the absence of proof of ı
ces arising to change his condition bet
receipt of the goods and the failure, Gra
ave known that he must fail and to hav
gnment when he received the goods s
ch the court answered, 'that is a quest
obvious that the request was aimed at tl
of law to be drawn in a case where
ould only be a presumption of fact. The
t on the twenty-second of March, indic
that he must fail and make an assign
the proposition was that if the situ
ces were just the same six days earlier he
ı to have known that he could not pay.
say that what he then knew and th

immaterial, because it might prove to be an important fact bearing upon his intent at the date of the order, for if an unchanged situation transferred the intent back to the receipt of the goods, it would equally transfer it back to the date of the original contract: but the court could and did say that the inference was one of fact and not of law. We can see in this ruling no purpose to change the position previously assumed, and it is at all events quite certain that the jury were not freed from the distinct and definite impression made upon them at the earlier period. If the error was to be corrected at all, it should have been done frankly and clearly and not left to be argued out of another proposition dealing with a different question. The jury were justified in the assumption that no change in the ruling three times made was either intended or effected.

"For this error the judgment should be reversed and a new trial granted, costs to abide the event."

Charles E. Ide for appellant.

Calvin J. Huson for respondent.

FINCH, J., reads for reversal.
All concur.
Judgment reversed.

DAVID S. RANDALL, Respondent, *v.* THE STATE OF NEW YORK, Appellant.

(Argued October 27, 1891; decided December 1, 1891.)

APPEAL from award made by the Board of Claims December 19, 1888.

Charles F. Tabor, Attorney-General, for appellant.

Melvin F. Stephens for respondent.

Agree to affirm; no opinion.
All concur.
Award affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* SETH BIRD et al., Respondents.

(Argued October 28, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term, and affirmed an order denying a motion for a new trial.

E. T. Lovatt for appellant.

Henry C. Griffin for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

ALFRED LAWRENCE et al., Appellants, *v.* NICHOLAS H. FREELAND et al., Respondents.

(Argued October 28, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 10, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

E. T. Lovatt for appellants.

Henry C. Griffin for respondent.

Agree to dismiss appeal on authority of *Wood* v. *Leany* (124 N. Y. 83); no opinion.
All concur.
Appeal dismissed.

MEMORAI

ony, Responden
Impleaded, etc.

28, 1891, decided I

judgment of the
ty of New York,
hich affirmed a j
a verdict, and
w trial.

S. Johnston for

Arrowsmith fo

m; no opinion.

firmed.

)ro, Respondent
Railroad Compa

r 29, 1891; decided I

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lyn, entered upo
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and affirmed an

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y for respondent.

rm; no opinion.

firmed.

ENOCH P. HINCKS et al., Respondents, *v.* AARON FIELD et al., Appellants.

(Argued October 29, 1891; decided December 1, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 9, 1891, which affirmed a judgment in favor of plaintiffs entered upon a decision of the court on trial without a jury.

Edward P. Lyon for appellants.

William J. Fanning for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

BURR MATTICE, Respondent, *v.* HENRY WILCOX, Appellant.

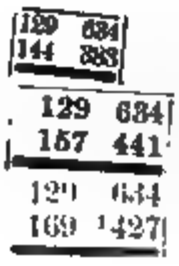
(Argued October 30, 1891; decided December 8, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 3, 1891, which affirmed a judgment in favor of plaintiff entered upon an order of Special Term sustaining a demurrer to a part of defendant's answer.

F. R. Gilbert for appellant.

Douglas W. Miller for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.



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EARL, J., reads for affirmance.
All concur.
Judgment affirmed.

ROXANNA H. LAWRENCE, as Executrix, etc., et al., Respondents, *v.* HENRIETTA CHURCH, as Executrix, etc., Appellant.

(Argued November 30, 1891; decided December 8, 1891.)

MOTION to correct remittitur.
The case is reported in 128 N. Y. 324.
The following is the opinion in full:

"In this case, if the question had been presented to us of striking out all other items of recovery and simply retaining the judgment for the $3,000, with interest from the commencement of this action, we think we should have made such an order. The plaintiffs' willingness to so consent was not presented, and had not occurred to us. The record shows no error regarding the $3,000 item, excepting the allowance of interest from the time of the execution of the contract. A plain case for recovery of the principal sum was proved. There was, however, no demand for its payment prior to the commencement of this action proved, and we thought that the plaintiff might very probably be able to prove it, and such demand would permit interest to run on the principal from the time it was made. We assumed the plaintiff would also desire to prove her other demands. She, however, thinks proper to remit all interest, except from the time of the commencement of the action, and to remit all right to recover any other item which entered into the original judgment. We think she should be permitted to do this.

"The statement as to the insolvency of the estate of the defendant's testator certainly strengthens the reason for granting the amendment. The defense has been heard as to the $3,000 item, and no valid answer to the claim was shown. If there be a question as to the solvency of the estate, the plaintiff should have the benefit of the judgment she obtained, modified as provided. Upon all the facts, it is clear that justice will be promoted by granting this motion."

J. H. Stevens for motion.

PECKHAM, J., reads for grar
All concur.

Ordered, that the Supreme
remittitur herein to the cou
further ordered, that the remi
that the judgments of the (
reversed and a new trial order
and consents that the original
be modified by deducting th
amount of $3,000, with intere
ment of this action, and in cas
the judgment, as modified, i
plaintiff in any court.

GEORGE HEROLD, Respondent
v. VATED RAILWAY COM

This case was argued and d
R. Co. (*ante*, page 274).

JOHN P. MAGOVERN et al.,
v. ROBERTSON et

(Submitted October 28, 1891; deci

APPEAL from judgment of tl
Court in the fifth judicial dep
made April 16, 1891, which a
plaintiffs entered upon the rep

A. C. Pickard for appellan

William H. Henderson for

Agree to affirm; no opinio
All concur.
Judgment affirmed.

MICHAEL BERGMAN, Respondent, *v.* THE MANHATTAN RAILWAY COMPANY et al., Appellants.

(Argued October 29, 1891; decided December 15, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 4, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury.

Samuel Blythe Rogers for appellants.

Charles A. B. Pratt, Jr., for respondent.

Agree to affirm on authority of *Kernochan* v. *N. Y. El. R. R. Co.* (128 N. Y. 559) and *Lynch* v. *Metropolitan El. R. Co.* (*ante*, page 274); no opinion.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. ROSWELL P. FLOWER, Appellant, *v.* FREDERICK W. BLECKWENN, Treasurer, etc., Respondent.

132-323.

(Argued November 30, 1891; decided December 15, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 9, 1889, which reversed an order of Special Term allowing a peremptory writ of mandamus.

Eliphalet Nott Anable for appellant.

George W. Stephens for respondent.

Agree to affirm; no opinion.

All concur.

Order affirmed.

EOPLE ex rel. WILLIAM I
HN J. GORMAN, Sheriff, e

November 30, 1891; decided D

. from order of the Gen
the first judicial departm
rmed an order of Special
rpus.

M. Williams for appellan

F. *Severance* for responde

o affirm; no opinion.
cur.
ffirmed.

COPLE ex rel. CHARLES V.
BOARD OF SUPERVISORS O
llant.

November 30, 1891, decided D

from order of the Gen
he second judicial departi
rmed an order of Specia
or modify a judgment in

n *Romer* for appellant.

W. *Bates* for respondent.

o dismiss appeal; no opir
cur.
dismissed.

A. CLEGG, Respondent, v
PAPER UNION et al.,

November 30, 1891; decided D

from order of the Gene
he first judicial departme

which reversed an order of Special Term, denying a motion by plaintiff for a new trial and a motion by defendant for a reargument.

Horace Russell for appellants.

William B. Hornblower for respondent.

Agree to affirm order as to all the defendants, except Bealls, Foster and Rowell, and as to them order reversed; no opinion.
All concur.
Ordered accordingly.

DAVID MILLER, Respondent, *v.* BENJAMIN WRIGHT et al., Appellants.

(Argued November 30, 1891; decided December 15, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made May 11, 1891, which granted a motion to dismiss an appeal from a judgment in partition entered upon the report of a referee.

Norton Chase for appellants.

Samuel Keeler and *F. P. Bellamy* for respondent.

Agree to affirm; no opinion.
All concur.
Order affirmed.

THE PEOPLE ex rel. CHARLES J. CLINCH et al., Appellants, *v.* HARRISON S. MOORE et al., Respondents.

(Argued November 30, 1891; decided December 15, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 2, 1891, which affirmed an order entered upon the report of referees affirming an order of the commissioner of highways in laying out a highway.

Thomas Yo

James S. Al

Agree to affi
All concur.
Order affirm

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etc., Respon
MENT COMPA

(Submitted Nov

APPEAL fro
Court in the fi
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referee.

John C. Sha

James P. C

Agree to dis
is not final ; n
All concur.
Appeal dism

In the Matter

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Under and by th
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tion to entertain

(Argued Decem

APPEAL from
Court in the sec
made March 12
of Westchester

This proceeding was instituted by Anna F. Dromgoole, one of the executors of Jacob L. Ryder, deceased, for the purpose of proving a claim for $1,000 for services rendered.

The following is the opinion in full:

"The proceeding was instituted by petition of Anna F. Dromgoole, one of the executors, to the surrogate, setting forth the death of the testator, the probate of the will, the qualification of the executors, that the petitioner and Sarah E. Hall were the only children of the testator, and the claim of the petitioner against the testator and praying that a citation issue to the co-executor and Sarah E. Hall to 'attend the proof of the said claim before the surrogate.' The citation was issued and served on the persons named, and on the return day Sarah E. Hall put in an answer denying the validity of the claim and objecting that the surrogate could not determine its validity, and that the claimant must bring her action.

"The co-executor made no answer.

"The case was tried before the surrogate, who rendered a decree establishing the claim to the extent of $1,000, and directing that the co-executor pay to the petitioner out of the estate the sum awarded.

"The petition was filed more than a year after the issuing of letters testamentary. There was no proceeding for a settlement pending at the time. The matter was an isolated proceeding instituted and conducted solely for the purpose of establishing the claim of the petitioner.

"On the hearing the attorney of Mrs. Hall moved to dismiss the petition on the ground that the surrogate had no jurisdiction to pass on the claim, and at the conclusion of the case an exception was taken to the refusal of the court to rule that the surrogate had no jurisdiction upon the pleadings to entertain the application. The point we think was well taken. Section 2739, of the Code of Civil Procedure provides that 'upon the judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent.' We find no other provision in the Code on the subject. Under the Revised Statutes an executor or administrator was prohibited from retaining any of the property of

ı satisfaction of his own debt,
lowed by the surrogate. (2 1
7 (Chap. 460, § 37), added a
lebt of an executor or admi
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proper person, or on the fi
or administrator.'
ses were determined while the
le v. *Kyle*, 67 N. Y. 408
id. 400; *Boughton* v. *Flint*,
noticed that section 2739 of
administrator to prove his clai
his account, and does not cont
ained in the act of 1837, th
e and return of a citation,'
e provisions of the Revised S
e repealed, and section 2739
ovision on the same subject.
te that section as including a
may act at any time, and so
ceeding in question. The fact
, a revision of the prior stat
te the court to insert in a sec
relief required, an implied p
e surrogate to exercise the
her time, simply because suc
rior statutes.
rs of Surrogates' Courts are lim
of the Code, which defines
ncludes with the declaration
exercised in the cases and in
ute.' Section 2475 strengthe
74 was intended to confine
permit proof of the claim
to the occasion of a judicial se
the running of the Statute of
m the death of the decede
ment' of the account of
This provision would have

the executor or administrator could at any time have had his claim established.' (See *Treat* v. *Fortune*, 2 Brad. 116.) In fixing the judicial settlement as the occasion when this proceeding should be taken, the legislature may have thought that creditors and all parties interested would then be most likely to have actual notice that a claim against the estate was made by the executor or administrator.

"We regret to be obliged to reverse the judgment of affirmance, but we see no other course. It is important that the construction of the statute be settled as a guide in future cases.

"The judgment should be reversed."

Abraham L. Fromme for appellant.

Close & Robertson for respondent.

ANDREWS, J., reads for reversal.

All concur.

Judgment reversed.

In the Matter of the Application of ROSWELL P. FLOWER, Appellant, for an order directing FREDERICK W. BLECKWENN, as Treasurer, etc., to Cancel Certain Water-rates.

THIS case presented the same question and was argued and decided with *In re Trustees of Union College* (*ante*, page 308).

GEORGE F. COMSTOCK, *v.* THE CITY OF SYRACUSE.

THIS case was argued and decided with *Sweet* v. *City of Syracuse* (*ante*, page 316).

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant, *v.* THE TRADESMEN'S NATIONAL BANK of the City of New York, Respondent.

(Argued December 1, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order

ay 21, 1890, which affir
it, entered upon a decisio
y.

. *Sterne* for appellant.

as Allison for respondent

to affirm; no opinion.
ncur.
ient affirmed.

CK C. LINDE et al., Resp
as Sheriff, etc.,

December 2, 1891; decided D

AL from judgment of the G
the first judicial departm
bruary 13, 1891, which a
iffs entered upon a verdic
tion for a new trial.

umenstiel for appellant.

E. Parsons for responder

to affirm; no opinion.
ncur.
ient affirmed.

'. BROWN, Respondent, *v*
etc., Appe

December 2, 1891; decided D

AL from judgment of the G
the second judicial depart
bruary 2, 1886, which aff
iff entered upon a verdic

E. B. Hinsdale for appellant.

E. F. Hyde for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

WILLIAM P. TITUS, Respondent, *v.* JOHN E. HAYNES et al., Appellants.

(Argued December 2, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, entered upon an order made April 28, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Moore & Moore for appellants.

Reuben H. Underhill for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

CLARA ISABELLE CURTIS et al., Appellants, *v.* ANN MURPHY et al., Respondents.

(Argued December 3, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made June 3, 1890, which overruled plaintiffs' exceptions, directed by the court in favor of defendants, denied a motion for a new trial and directed judgment in favor of defendants upon said verdict.

John Townshend for appellants.

John F. Dillon for respondents.

to affirm on authority c
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ient affirmed.

ıy Dolan, Appellant,
Respo

December 8, 1891; decide

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the second judicial de
bruary 10, 1890, which
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Term.

McCloskey for appell

F. Jenks for respond

to affirm; no opinion.
ncur.
ient affirmed.

J. Axt et al., Respo
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the second judicial dep
bruary 9, 1891, which
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W. Weiant for appel

Comesky for respond

to affirm; no opinion.
ncur.
ient affirmed.

THE UNITED STATES NATIONAL BANK, Respondent, *v.* THE NATIONAL PARK BANK, of New York, Appellant.

(Argued December 4, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made April 17, 1891, which affirmed a judgment in favor of plaintiff, entered upon the report of a referee.

Peter A. Hendrick for appellant.

James G. Janeway for respondent.

Agree to affirm on opinion of General Term.
All concur.
Judgment affirmed.

GATES THALHEIMER, Appellant, *v.* FELIX C. KLAPETZKY et al., Respondents.

129b 647
163 49

(Argued December 4, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made February 3, 1891, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term.

Thomas Hogan for appellant.

C. G. Baldwin for respondents.

Agree to affirm on authority of *Manning* v. *Beck* (*ante*, page 1); no opinion.
All concur.
Judgment affirmed.

DAVID SEARS et al., Respondents, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Appellants.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

il 6, 1891, which affirmed a judg
entered upon a decision of the
n.

muel Blythe Rogers for appellar

. *Willett Van Nest* for respondent

gree to affirm on authority of *Ly*
ante, page 274); no opinion.
ll concur.
idgment affirmed.

: S. KORN, Respondent, *v.* THE N
RAILWAY COMPANY et al.
SAME, Respondent, *v.* THE S.

gued December 4, 1891; decided Decen

PPEAL from judgment of the Gene
rt in the first judicial departme
e March 13, 1891, which affirme
laintiff entered upon decisions
ial Term.

rainard Tolles for appellants.

eorge Zabriskie for respondent.

gree to affirm; no opinion.
ll concur.
idgments affirmed.

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s MESSENGER, Respondent, *v.* TH
COMPANY et al., App

gued October 7, 1891; decided Decemb

PPEAL from judgment of the Gene
t of the city of New York, ente
uary 13, 1891, which affirmed

plaintiff entered upon a decision of the court on trial at Special Term.

Samuel Blythe Rogers for appellants.

Lewis L. Delafield for respondent.

Agree to reverse and order new trial on authority of *Roberts* v. *N. Y. E. R. R. Co.* (128 N. Y. 455); no opinion.

All concur.

Judgment reversed.

EDWARD JACOBY, Respondent, *v.* HENRY A. OCKERHAUSEN, Appellant.

129a 649
140 287

(Argued December 7, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed a judgment in favor of plaintiff entered upon a verdict and affirmed an order denying a motion for a new trial.

Frederick E. Anderson for appellant.

Clarence Melbury Smith for respondent.

Agree to affirm; no opinion.

All concur.

Judgment affirmed.

CHARLES C. LEARY, as Administrator, etc., et al., Appellants, *v.* HENRIETTA HUTTON et al., Respondents.

(Argued December 8, 1891; decided December 22, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 29, 1890, which directed a judgment in favor of the defendants upon a submission of a controversy, under section 1279 of the Code of Civil Procedure.

H. Harris for appellants.

Cadwalader for respondents.

affirm on opinion below.
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it affirmed.

ELFER, Respondent, *v.* MORGL
Appellants.

December 8, 1891; decided Decembe

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e second judicial department, en
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entered upon a decision of t
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wing is a *mem.* of the opinion
ount involved in this controve
urt jurisdiction of the appeal.
mages awarded against the appe
and fall short of the amount au
rt. The appeal should, there

Graves for appellants.

J. Gaynor for respondent.

iam mem. for dismissal of app
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lismissed.

HILHOOLY, Respondent, *v.* AD
Appellant.

ecember 4, 1891; decided December 2

o dismiss appeal from judgm
e Court of Common Pleas in an

county of New York, which affirmed a judgment in favor of plaintiff entered upon an order sustaining a demurrer to defendant's counter-claim.

Adolph Tannenbaum for appellant.

William E. Gilhooly for respondent.

Agree to grant motion; no opinion.
All concur.
Appeal dismissed.

THOMAS TAYLOR, Appellant, *v.* THE VILLAGE OF MOUNT VERNON, Respondent.

(Submitted December 9, 1891; decided December 23, 1891.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made December 8, 1890, which reversed a judgment in favor of plaintiff entered upon the report of a referee, and ordered a new trial.

Eugene Archer for appellant.

Joseph S. Wood for respondent.

Agree to affirm, and judgment absolute ordered for defendant on stipulation, with costs; no opinion.
All concur.
Ordered accordingly.

FRANK WORK et al., Appellants, *v.* MILES BEACH, Respondent.

(Argued December 9, 1891; decided December 23, 1891.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made March 13, 1891, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

Henry S. Bennett for appellants.

Augustus C. Brown for respondent.

Agree to affirm on opinions below.
All concur.
Judgment affirmed.

THE PEOPLE ex rel. PATRICK J. RYAN, Re
BOARD OF COUNTY CANVASSERS OF ONONDA
Appellants.

(Argued December 15, 1891; decided December 29,

APPEAL from order of the General Term
Court in the third judicial department, ma
1891, which affirmed an order of Special
peremptory writ of mandamus.

Louis Marshall for appellants.

William Nottingham for David A. Munr

Joseph H. Choate, William A. Sutherland
J. F. Parkhurst and *Eugene Burlingame* fo

Agree to affirm; no opinion.
All concur, except ANDREWS, FINCH and
dissenting.
Order affirmed.

In the Matter of the Application of RUFUS T
ent, for a Writ of Mandamus, *v.* THE STAT
VASSERS, Appellant.

THE SAME, Respondent, *v.* THE COUNTY BOAR
OF ONONDAGA COUNTY, Appella

(Argued December 11, 1891; decided December 29,

APPEALS from orders of the General Term
Court in the third judicial department, ma
1891, which affirmed orders of Special Term

of peremptory mandamus to issue in each of the above proceedings.

I. H. Maynard and *Delos McCurdy* for appellants.

William Nottingham for respondent.

Joseph H. Choate, William A. Sutherland and *Matthew Hale* for respondent.

Agree to reverse and deny applications; no opinion.

All concur.

Orders reversed and applications denied.

CHARLES R. JOHNSON, Appellant, *v.* THE UNION SWITCH AND SIGNAL COMPANY, Respondent. 132-564

(Argued October 16, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made March 4, 1891, which overruled plaintiff's exceptions, denied his motion for a new trial and directed judgment for defendant upon the order of the trial court dismissing the complaint.

This action was brought upon a contract whereby plaintiff became defendant's manager at an increased salary, and gave them an exclusive right to use several inventions of which he was the patentee.

The simple question presented was as to the interpretation of the contract.

The opinion is marked by the court not to be reported.

George W. Miller for appellant.

John W. Houston for respondent.

EARL, J., reads for affirmance; ANDREWS, FINCH and GRAY, JJ., concur.

O'BRIEN, J., reads for reversal; PECKHAM, J., concurs.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, Re
FITCHBURG RAILROAD COMPANY, Ap

THIS case presents the same question and
decided with *People* v. *N. Y., Chicago &*
Co. (*ante*, page 474).

CLEVELAND D. FISHER et al., Appellants,
FISHER et al., Respondents.

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156 224

The provision of the Code of Civil Procedure (§ 834),
closure by a physician of any necessary informatio
fessional capacity, applies only to information the
attending a patient; not to information obtained b
way.

(Submitted December 8, 1891; decided January 20,

APPEAL from judgment of the General Ter
Court in the second judicial department, ente
made February 17, 1889, which affirmed a j
of defendants, entered upon a decision of the
Special Term.

The following is the opinion in full:

"This is an action of partition brought by
partition lands alleged in the complaint to bel
to the action as tenants in common. The
upon the trial was over a deed executed by
the 11th day of April, 1888. The title of t
of some of the defendants to a portion of the
be partitioned depended upon the validity of
of the defendants claimed that it was procu
undue influence, and that, therefore, it was v
tive. Upon that question considerable evi
upon both sides; and the trial judge foun
was procured by improper influence and that,
void and inoperative.

"We have carefully scrutinized the evid
reason to doubt that the conclusion of the

abundantly supported and that his judgment thereon should not be disturbed.

"There were no facts or circumstances in the case which estopped the parties assailing that deed from claiming its invalidity.

"Upon the trial Doctor Curtis was called to give evidence as to the mental condition of Eliza Fisher at or about the time when she executed the deed. It appears that he had attended and prescribed for her professionally, and that he had also seen her at various times when he was not in attendance upon her for the purpose of treating her professionally. He was asked various questions as to her mental condition, excluding from his mind in answering the questions any knowledge or information which he had obtained as to her condition while acting as her medical attendant, and confining his answers to such knowledge and information as he had obtained of her by seeing her when she was not his patient. Counsel for the plaintiffs objected to the competency of the witness under section 834 of the Code. The court overruled the objection and the witness was permitted to answer, and he gave material evidence as to the mental condition of Eliza Fisher. In this there was clearly no error. (*Edington* v. *Ætna Life Ins. Co.*, 77 N. Y. 564; *People* v. *Schuyler*, 106 id. 304; *Hoyt* v. *Hoyt*, 112 id. 515.) The prohibition of that section applies only to information the physician acquired in attending the patient in a professional capacity, and it does not apply to information obtained by him in any other way.

"The judgment should be affirmed with costs."

Martin J. Keogh for appellants.

Isaac N. Mills for respondents.

EARL, J., reads for affirmance.
All concur.
Judgment affirmed.

CHARLES A. BRECK, Respondent, *v.* FREDE
Impleaded, etc., Appellan

Defendant sold plaintiff the plant of a zinc etchi
appliances and good will of the business, etc.; he
and not to be employed by or enter into partne
or persons carrying on the same business for fi
did not thereafter carry on the particular busi
but in his business, which was electrotyping and
zinc etchings, and usually employed plaintiff to
few instances he procured them from other pe
recover damages for an alleged breach of the c
violation of it in letter or in spirit was shown.

(Argued December 9, 1891; decided January 20, 1

APPEAL from judgment of the General Te
Court in the first judicial department, ente
made February 11, 1891, which affirmed a
of plaintiff entered upon a verdict, and
denying a motion for a new trial.

The following is the opinion in full:

"In March, 1886, the defendant entered
with the plaintiff whereby he sold to him
Photo Engraving Company plant, at 157
street, New York, consisting of machinery,
and stock on hand, and every and all applian
ness and connected therewith in any manner
with the good will of the business, the title
and the right to do business under the title
sum of $14,000, to be paid by the plaintiff.
to the plaintiff the lease of the premises i
where the business was carried on. He
follows: 'Said Frederick A. Ringler shall
same line of business, the good will of whic
to be sold to the party of the second part
employed by or enter into any partnership
persons in carrying on the same line of b
or manner whatever for the term of five y
day of April, 1886, *and for any forfeiture*
ance with this portion of this agreement wi

time, the said Frederick A. Ringler shall pay unto the said party of the second part the sum of $5,000, which is hereby agreed upon as liquidated damages, and shall be due and owing to the party of the second part immediately upon such forfeiture or non-compliance.'

"The plaintiff claiming that the defendant had violated this portion of the agreement, brought this action to recover the stiputated sum of five thousand dollars, as liquidated damages.

"What is the precise scope of this agreement? (1) That the defendant will not carry on the same line of business; (2) that he will not enter into the employment of any person or persons who carry on the same line of business; (3) that he will not enter into partnership with any person or persons who carry on the same line of business. This is plainly the meaning of the agreement.

"Now, did the defendant violate this agreement? The particular line of business sold by the defendant to the plaintiff was that of zinc etching, and it is undisputed that he never thereafter carried on that business. He had no machinery or implements, or plant of any kind by which he could make zinc etchings, and he had no workmen engaged in that business. He was engaged in the business of electrotyping and stereotyping, and in that business used zinc etchings manufactured by other persons; and no claim is made that he did not have the right so to use them. There is no proof that he ever manufactured a single plate of zinc etching, but what he did do in a few instances was to employ others, who were engaged in the business of zinc etching, to manufacture for him some zinc etching plates. Among others, he employed the plaintiff to do this, and generally when he was called upon for a zinc etching plate, or had occasion to use one in his business, he employed the plaintiff to make it. There were a few instances in which he employed some other person, who was engaged in that business, to make zinc etching plates for him, and in doing this the plaintiff claims he violated the agreement. There is nothing in the agreement which prohibited him, if he wanted a zinc etching plate, or if any friend or customer of his desired one, to procure some one, who was in the business, to make it

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CATHARINE KEATING, Respondent, v. JACOB GUNTHER, Appellant.

(Argued December 10, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made July 18, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

William Van Amee for appellant.

William F. O'Neill for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

EDWARD MCSORLEY, Respondent, *v.* BRIAN G. HUGHES et al., Impleaded, etc., Appellants.

(Argued December 10, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 8, 1890, which affirmed a judgment in favor of plaintiff entered upon a decision of the County Court of Richmond County.

Samuel Greenbaum for appellants.

Lyman L. Settel and *Sidney F. Rawson* for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

"The main items in the recovery in this case are for services rendered by the plaintiff as attorney for the defendant in what are called the *Bennett* case and the case of the *Second Avenue Railroad*, which were suits brought by the defendant. It is admitted in the answer that the services of the plaintiff in these litigations were not rendered under either the agreement of October 2, 1880, or that of October 1, 1882, and did not relate to collections mentioned in these agreements.

"But it is claimed by the defendant that these suits were undertaken by the plaintiff under a special agreement made between the plaintiff and the defendant, made in behalf of the plaintiff by his brother, H. H. Leavitt, by which his fee was to be contingent upon a recovery in the actions. The plaintiff denied that his brother was authorized to enter into any agreement for his services, and alleged that the defendant not only knew that he had no such authority, but that he dealt with the plaintiff directly as principal during the course of the litigations. The plaintiff admits that the defendant proposed to him that he should undertake and conduct these litigations in consideration of a contingent fee, but claims that he was disinclined to make such an agreement and so informed the defendant, and that no agreement was made between them on the subject.

"The referee found for the plaintiff on the issue. The evidence in behalf of the respective parties upon the point is irreconcilable, and the referee's decision on the fact is final here. The defendant claims that the plaintiff and his brother were partners in respect to business undertaken by the plaintiff for the defendant and that the arrangement by H. H. Leavitt was binding upon the plaintiff upon the principle of agency. The counsel for the defendant is mistaken in his assumption that the referee proceeded upon the ground that no partnership could exist between the plaintiff, a lawyer, and H. H. Leavitt, who was not at the time a lawyer, in respect to the conduct of legal business. The brothers were jointly interested in the business furnished by the defendant, in collections for advertising. But this did not authorize H. H. Leavitt to bind his brother by contracts for the latter's services in other matters. Whether his contract did bind him would

made April 29, 1890, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Edmund O'Conner for appellant.

Frederick Collin and *H. Austin Clark* for respondents.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

THE MANUFACTURERS' NATIONAL BANK, Respondent, *v.* DUDLEY HALL et al., Defendants, THE EPPENS, SMITH & WIEMAN COMPANY (Limited), Appellant.

(Submitted December 14, 1891; decided January 20, 1892.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made June 26, 1891, which affirmed an order of Special Term denying a motion to vacate an attachment issued in favor of the plaintiff.

Root & Clarke for appellant.

George M. Pinney, Jr., for respondent.

Agree to affirm; no opinion.
All concur, except PECKHAM, J., dissenting.
Order affirmed.

RUAMA CLARK, as Administratrix, etc., Respondent, *v.* SUSAN M. CORWIN et al., as Executors, etc., Appellants.

(Argued December 14, 1891; decided January 20, 1892.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, made July 2, 1891, which affirmed an order of Special Term allowing plaintiff costs.

MEMORA

ert O. Hulse for appella

iam F. O'Neill, for res

e to affirm; no opinion.
oncur.
r affirmed.

EOPLE ex rel. THE EDISO
of New York, Resp
ptroller, etc., Appellant.

corporation was organized u
), providing for the incorpo
thority given by the act of
lvely engaged in generatin
purpose of illumination, *he*
on within the meaning of the
assessment and taxation of
), as amended by chap. 361
axation prior to the passage
aws of 1889), which took
tion clause, that the fact th
the General Manufacturing
acturing corporation.

d December 14, 1891; decid

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"The questions involved in this case are the same as those passed upon by us at this term in the case of *People ex rel.* v. *Brush Electric Illuminating Co.* v. *Wemple, Comptroller, etc.** The record does not show any material difference in the facts out of which the questions arise. The relator was incorporated December 16, 1880, under chapter 37 of the act of 1848, providing for the incorporation of gas companies, whereas the relator in the other case was incorporated under what is known as the act for incorporating manufacturing companies, passed the same year. We do not think it is material how, or under what particular statute, the relator came into existence as a corporation. The material question is whether, during the years for which the tax in question was paid, it was engaged in business as a mauufacturing company within this state. It was incorporated subsequent to the passage of the act (Chap. 512, Laws of 1879) authorizing gas companies to engage in the business of supplying electric currents for purposes of illumination. Since its incorporation, the relator's sole business has been the manufacture and sale of electric currents for purposes of illumination, within the city of New York, and its entire capital has been and is employed in that business. The relator made the reports and paid the taxes under chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881, for the years 1886, 1887 and 1888, but made no reports and paid no taxes for the years 1881 to 1885 inclusive. The comptroller caused an investigation of its affairs to be made, and on the 21st of February, 1890, settled an account against it for taxes and penalties amounting to $5,090.45, and served a copy of the same. No warrant was issued to collect the tax, but the relator, on March 24, 1890, paid it into the state treasury. On July 2, 1890, it filed an application in the form of a petition, accompanied by affidavits showing the nature of its business, with the comptroller, asking that the account settled against it for taxes be revised and resettled under the act of 1889. On November 26, 1890, the comptroller denied this application, and on the 26th of December, 1890, the relator, upon a petition, gave notice of an application for the writ

* *Ante*, page 543.

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Agree to dismiss appeal on ground that it was discretionary with the Court of Sessions to vacate or modify the order; no opinion.

All concur.

Appeal dismissed.

WILLIAM P. WALTON et al., Respondents, *v.* ALBERT P. STEWART, Trustee, etc., Appellant.

(Submitted December 14, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made November 19, 1891, which affirmed a judgment in favor of plaintiffs entered upon an order of Special Term overruling a demurrer to the complaint.

J. K. Hayward for appellant.

Charles H. Collins for respondents.

Agree to affirm on opinion below.

All concur.

Judgment affirmed.

FREDERICK K. KELLER, Respondent, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY, Appellant.

(Submitted December 16, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 12, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

Julien T. Davies and *Brainard Tolles* for appellant.

Edwin M. Felt for respondent.

Agree to reverse and grant new trial on authority of *Roberts* v. *N. Y. E. R. R. Co.* (128 N. Y. 455).

CLARK WOODWORTH, Respondent, *v.* THOMAS C. HODGSON, et al., Appellants.

(Argued December 16, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1891, which affirmed a judgment in favor of plaintiff, entered upon a verdict of the County Court of Monroe county and affirmed an order denying a motion for a new trial.

William F. Cogswell for appellant.

Edward Harris for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

MICHAEL J. FINNELL, Respondent, *v.* THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Appellant.

Railroad tracks are not ballasted for the purpose of making them safe for the employes of the company to walk thereon, but to make them firm and safe for the passage of trains, and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty it owes its employes.

Plaintiff, a brakeman in defendant's employ, was upon the tender of an engine backing down slowly upon a side track used for stowing cars and making up trains, for the purpose of coupling it with a car standing on the said track; this was not ballasted like the main track and between some of the ties there was no ballast. Plaintiff was an experienced brakeman acquainted with the locality, and the condition of the track was perfectly visible; he had the entire control of the movements of the engine and could have stopped it by a motion of his hand to the engineer. Plaintiff jumped from the tender into the middle of the track as it approached the car and while slowly walking backward attempting to remove the link in the draw-head of the car, his foot caught between two ties and he was run over and injured. In an action to recover damages, *held*, that there was no negligence on the part of defendant, and that plaintiff was chargeable with contributory negligence.

Plank v. *N. Y. C & H. R. R. R. Co.* (60 N. Y. 607), distinguished.

(Argued December 17, 1891; decided January 20, 1892.)

APPEAL from judgment of the General T
Court in the fourth judicial department, en
made February 3, 1891, which affirmed a
of plaintiff entered upon a verdict and
denying a motion for a new trial.

The following is the opinion in full:

"In September, 1888, the plaintiff was
service of the defendant, and while attemp
to the tender of an engine upon a branch t
was caught between two ties and he was
badly injured; and this action was brou
damages.

"While this case appeals very strongly t
are unable to uphold this recovery. Th
experienced brakeman and was acquainte
where the accident happened. The branc
structed for the purpose of running trains
for the purpose of storing cars and making
not ballasted like the main track, and at th
dent there were some ties between which t
ing whatever. The condition of the tr
perfectly visible, as it was broad day-lig
the accident. The plaintiff was upon
engine as it backed from the main trac
He had entire control of the movement
could order it to be stopped at any time
hand to the engineer, and thus it was backi
track under his direction. As it backed f
feet the condition of the track was pla
standing upon the brake-beam at the rear
backed at the rate of about two miles an
fast as a man would ordinarily walk. It b
the plaintiff to draw an iron bolt and take
was in the draw-head of the tender, throw
which was in the draw-head of the car, and
be replaced in the draw-head of the tender
by the bolt. At a short distance from the c
was thus being backed, he jumped off
middle of the track, and attempted to re

the draw-head while he was slowly walking back between the tender and the car, and as he was thus walking he claims that his foot caught between two ties, his toe partly under one and his heel against the other, and that it was thus fastened so that he could not withdraw it, and that the wheels of the tender passed over his legs. He claims that the defendant was negligent in not ballasting this branch track, so as to make it safe for him to walk thereon and to discharge his duty as brakeman while standing thereon. But we do not understand that railroad tracks are ballasted for the purpose of making them safe for brakemen to walk upon, but for the purpose of making them firm and safe for the passage of trains, and we do not think the defendant neglected any duty it owed the plaintiff in not ballasting the track at the place where the accident occurred. It is not claimed that there was any trap in the track, or that the track was in any respect defective or dangerous, except in that it was not ballasted. A brakeman is engaged in a business attended with many risks, and it is difficult to see how this recovery can be upheld without casting all the risks of the employment upon the railroad company.

"But still further, the plaintiff was clearly guilty of contributory negligence. There was no rule of the company and no emergency that made it necessary for him to walk between the tender and the car while the engine was in motion, for the purpose of removing the link. The engine was under his control. He could have remained on the tender or on the side of the track until the car and tender were brought near together, and then he could have stopped the engine and drawn the link and made the coupling without danger. He knew the condition of the track, as it was before him perfectly visible, and he took the chances of walking upon the track while he was engaged in withdrawing the link, the engine being in motion, and thus he did an unnecessarily careless thing which contributed to this most unfortunate accident. This case is singularly like that of *Penn. R. R. Co.* v. *Hankey*, (93 Ill. 580), and that case is a very precise authority for the conclusion we have reached. This case is unlike that of *Plank* v. *N. Y. C. & H. R. R. R. Co.* (60 N. Y. 607). There, in the night time, the plaintiff's intestate was directed by the

the train to couple some cars on the side track, aged in so doing he stepped into a sluice-way or he track, about two feet wide and deep, which with stone on each side. There was a trap left l which rendered the track dangerous to any e company who had occasion to be there in the d there it was very properly held that it was a t for the jury whether the track was an ordinarily safe place for the performance of a brakeman's s more like the case of *Appel* v. *B., N. Y. & .* N. Y. 550), where plaintiff's intestate, a switch- in defendant's yard, in helping to make up and as, while engaged in his employment caught his ' which connected two converging tracks and ect the transfer of cars from one track to the ore he could release himself he was run over and action to recover damages for his death it was locks of wood could be placed in the openings ans prevent such accidents. It appeared that had been in the defendant's employ for some quite a length of time in and about the yard ident happened and was acquainted with the that it was not 'blocked,' and it was held that n accepting and continuing in the employment azard of all known and obvious dangers, and that able with notice of the difficulty in removing caught in the frog, and of the danger appre- rom; and, therefore, that a cause of action was and a refusal to nonsuit was error. Here in not be said that the track was obviously danger- nt brakeman. The accident was a very unusual to occur, and easily guarded against by any efully discharging his duties. Knowing the is track he should not have walked upon it, e greatest circumspection. As the engine was his control, he should either have stopped it or slowly that no accident could come to him. herefore, of opinion that the judgment should d a new trial ordered, costs to abide event."

Louis Marshall for appellant.

Edmund O'Connor for respondent.

EARL, J., reads for reversal and new trial.
All concur, except GRAY, J., not voting.
Judgment reversed.

CLAUDINE B. WEED, Appellant, *v.* VAN WYCK HEWLETT, Respondent.

(Argued December 17, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made December 31, 1890, which denied a motion for a new trial and ordered judgment in favor of defendant.

Daniel S. Remsen for appellant.

Josiah T. Marean for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

ELLEN M. QUINN, Appellant, *v.* MARGARET MCDONALD et al., Respondents.

ELLEN M. QUINN, Appellant, *v.* ANN MCDONALD et al., Respondents.

(Argued December 17, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed judgments in favor of defendants, entered upon decisions of the court on trial at Special Term.

E. H. Benn for appellant.

Henry C. Wilcox for respondents.

Agree to affirm; no opinion.
All concur.
Judgments affirmed.

ALICE HOLLAND, Appellant, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Respondent.

(Argued December 18, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, entered upon an order made April 8, 1890, which affirmed a judgment in favor of defendant, entered upon a decision of the court on trial at Circuit.

William King Hall for appellant.

David J. Dean for respondent.

Agree to affirm; no opinion.
All concur.
Judgment affirmed.

THOMAS B. GILFORD, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant.

(Argued December 18, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made February 18, 1891, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court.

David J. Dean for appellant.

Charles E. Miller for respondent.

Agree to reverse and grant new trial on authority of *Tripler* v. *Mayor, etc.* (125 N. Y. 617) and *Redmond* v. *Mayor, etc.* (Id. 632); no opinion.
All concur, ANDREWS, J., not voting.
Judgment affirmed.

SIGMUND OPPENHEIMER, Respondent, *v.* THE METROPOLITAN ELEVATED RAILWAY COMPANY et al., Appellants.

(Argued December 18, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made

February 4, 1891, which affirmed a judgment in favor of plaintiffs, entered upon a decision of the court on trial at Special Term.

Brainard Tolles for appellant.

L. C. Dessar for respondent.

Agree to affirm on the ground that the question is not sufficiently raised by exception; no opinion.

All concur.

Judgment affirmed.

CHARLES H. OTIS, Appellant, *v.* ANDREW T. BERTHOLF, Respondent.

(Argued December 18, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made February 9, 1891, which affirmed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term.

William Van Amee for appellant.

Louis E. Carr for respondent.

Agree to affirm on authority of *Manning* v. *Beck* (*ante*, page 1); no opinion.

All concur.

Judgment affirmed.

MICHAEL SHEEHAN, Respondent, *v.* XAVER MAYER, Appellant.

(Submitted December 21, 1891; decided January 20, 1892.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 22, 1886, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at

Special Term, and affirmed an order denying a motion for a new trial.

William H. Henderson for appellant.

Ansley & Vreeland for respondent.

Agree to affirm on opinion of General Term.
All concur.
Judgment affirmed.

Evalina K. Hollins, Appellant, *v.* W. Jennings Demorest et al., Respondents.

Where the owners of a block of land in a city laid it out into lots, and sold and conveyed a corner lot, subject to a right of way, fifteen feet in width across the rear thereof from the side street, "for horses, carriages and carts for the private convenience of the owners" of other lots, the way "to be kept open * * * for the uses and purposes aforesaid and no other," *held*, that the grantee and his successors in title were not restricted from building over the way, so long as they left it open the specified width, and to a heighth sufficient so as not to interfere with the passage of "horses, carriages and carts" through and along it; that they were not required to keep the way open for the purpose of furnishing light and air to buildings on the other lots.

(Argued December 21, 1891; decided January 20, 1892.)

Appeal from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made May 8, 1891, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought to restrain defendants from erecting a building over, or otherwise obstructing, a way.

John Cowman in 1832 died seized in fee of the block of land bounded by Fifth avenue, University (formerly Union) place and Sixteenth and Seventeenth streets. Said Cowman left a will, which was admitted to probate, whereby he authorized his executors to sell his lands at public or private sale. The executors, in 1836, concluded to offer for sale twenty-eight lots in that block, and placed on record a written instrument executed by them, commonly known as a deed poll. They at the same time filed a map of the block showing the

lots fronting on Fifth avenue as numbers 1 to 7 inclusive. Across the rears of lots 1 and 2 and 5, 6 and 7, was shown a space designated as "way" fifteen feet wide. The deed poll, among others, contained a clause whereby the executors declared:

"That the said 28 lots are, and shall be, subject to the following clauses, conditions and covenants, namely:" * * * "Also that fifteen feet in width across the rear of lots 1 and 2 on said map, shall be subject to a right of passage for horses, carriages and carts for the private convenience of the owners of lots 1, 2 and 3 on said map, and of their heirs and assigns, and their tenants respectively, actual occupants of the said lots, to and from Sixteenth street; also that fifteen feet in width across the rear of lots 5, 6 and 7, shall be subject to a similar right of way for the owners of lots 4, 5, 6 and 7, their heirs and assigns, and their tenants respectively, actual occupants of the said lots, for a passage from the rear of said lots from Seventeenth street, * * * and at the entrance of each of said ways into the street a proper and suitable gate with lock and key is to be kept and maintained, and the passage-way kept open and in proper order, etc., as a private passage-way for the uses and purposes aforesaid and no other."

The deed poll also contained the following clause: "Every purchaser accepting a deed of the said executors shall be deemed thereby as assenting to the terms and conditions aforesaid, as imposed for the advantage of each and every other purchaser."

Plaintiff obtained title through various mesne conveyances to lot No. 5.

Defendant Austin owns the northerly part of lot No. 7, which was conveyed by the executors of Cowman to Lois Cogswell by deed dated April 21, 1836. This deed recited the deed poll, and states that the conveyance is "subject, however, to all and singular the clauses, conditions and covenants in said deed poll expressed, so far as the same are applicable to the said premises hereby granted." All the subsequent conveyances contain the same provision and convey the premises subject to the deed poll. In 1890, defendant Austin executed a lease of her lot to defendant Demorest for ten

years, with the privilege to Demorest to make improvements and alterations to said premises at his expense, and of purchasing the premises within two years. The lease provides that in case a conveyance shall be made it shall be subject to the terms and conditions of said deed poll.

At the commencement of the action Demorest claimed the right under his lease to extend and was preparing to extend, and has since extended the building on the front of the lot over and across the way, supporting the rear part on iron columns one foot in diameter, placed on the extreme easterly side of the way, leaving an open space under the building through its whole width, fifteen feet in height and fifteen feet and nine inches in width.

More than twenty years before the commencement of this action, Lydia Griswold, the former owner of plaintiff's lot, erected a building on the way across that lot, completely closing it.

The court found that the building, as erected by Demorest, does not prevent or obstruct the plaintiff's use of the way underneath or beyond the building, and that plaintiff has not sustained and will not sustain any injury from the erection of the building or from its maintenance in the future.

The following is the opinion in full:

"The construction put by the courts below on the deed poll, if justified, is a decisive answer to the action.

"The defendant Austin has title in fee to the way over which the building erected by Demorest, as lessee, has been constructed. The way laid out on the map filed with the deed poll in 1836, extended from the south side of Seventeenth street, in rear of lots 7, 6 and 5, but the fee of the land included therein passed with the lots, from which the way was taken, to the several grantees. The owners of the respective lots held their titles to the way in subordination to the purposes for which the way was laid out and dedicated. They could do nothing to interfere with those purposes, but there was no restriction upon their right to use the land above or below the surface of the way, as they might choose, provided only that such use was not inconsistent with the easement in the way reserved in the deed poll to the owners of the respective lots.

"The deed poll states with great distinctness the purpose and intent of the way. It declares that 'fifteen feet in width across the rear of the lots 1 and 2 on the said map shall be subject to the right of passage for horses, carriages and carts, for the private convenience of the owners of the lots 1, 2 and 3, on the said map, and their heirs and assigns, and their tenants respectively, actual occupants of the said lots, for a passage from the rear of said lots to and from Sixteenth street.' It contains a similar provision in respect to the way from Seventeenth street, in rear of the lots 7, 6 and 5. It is also declared that at the 'entrance of each of the said ways respectively into the street, a proper and suitable gate, with lock and key, is to be kept and maintained and the passage kept open and in proper order and regulation at the joint expense of the owners and occupants, from time to time, of the lots entitled to use the said ways, each of whom shall be entitled to a key to the said gate for the purpose of opening and closing the same, as a private passage-way for the use and purpose aforesaid and no other.'

The deed poll was executed, in contemplation of a sale of lots on the block to which it related, between Sixteenth and Seventeenth streets, for residence purposes. The deed poll contains careful restrictions as to the use of the lots, so as to prevent their occupation for any noisome trade or business. The instrument shows that it was contemplated that the purchasers of the lots on Fifth avenue might desire to erect private stables in rear of their lots, and the reservation of the ways was designed to afford access from the street to the stables and to the rear of the lots. The structure erected by Demorest does not interfere with this use of the way for the purposes expressed in the deed poll, namely, for the passage of horses, carriages and carts to and from Seventeenth street. It is claimed that the clause in the deed poll that the passage was to be 'kept open,' can only be satisfied by permitting it to remain open to the sky, and that light and air for the benefit of the several lots was one of the objects intended by the reservation of the passage-ways. But the deed poll makes no reference to this purpose. It does not reserve an open way for general use, but expressly limits and defines the uses for

which the ways are intended, and to which they were to be appropriated. They were to be open ways 'for the use and purpose aforesaid, and no other.' The practical construction of the deed poll by the plaintiff and his grantor, who owns the lot opposite the end of the way, is adverse to the claim now made, that one of the objects of the way was to furnish light and air to the adjacent premises. The way in rear of lot 5 owned by the plaintiff, has been closed and a building erected thereon, completely excluding access to that part of the way, and preventing light and air from passing over the same to the other lots.

"The way in rear of the defendant's lot is not closed, but over it, fourteen feet above the surface, a building has been erected, supported by two iron posts set on the easterly edge of the way, but leaving a clear space for the way, exceeding fifteen feet in width. It is not claimed that the structure of the defendant interferes with the access to the plaintiff's lot from Seventeenth street for 'horses, carriages and carts,' through and along the way.

"The lots on Fifth avenue have become business property. No stables have been erected on the lots adjacent to the way. The purpose of the deed poll is fully satisfied by the way in rear of the defendant's lot, as it now exists. We concur in the view of the courts below that the deed poll did not restrict the owner of lot 7 from building over the way.

"The judgment should, therefore, be affirmed."

Charles Francis Stone for appellant.

James R. Marvin for respondents.

ANDREWS, J., reads for affirmance.
All concur, PECKHAM, J., in result.
Judgment affirmed.

PROCEEDINGS

IN THE

COURT OF APPEALS

IN REFERENCE TO THE DEATH OF

HON. WILLIAM C. RUGER,

Late Chief Judge of said Court,

WHO DIED JANUARY 14, 1892.

By order of the Court, the court-room and the chair of the deceased Chief Judge were draped in mourning.

Immediately after the opening of the court, on the 19th day of January, 1892, His Honor, CHARLES ANDREWS, Senior Associate Judge, read the following:

"This is the second time in the history of this court that it has assembled to take notice of the death of its Chief Judge, occurring during his incumbency of his great office. The first was that of the death of Chief Judge CHURCH. He died in the tenth year of his service, and the chief whose remains his associates have just now sorrowfully laid in their last resting place, held his office the same number of years, the period of his service being nearly identical.

"Death, the most common and the inevitable fact in human experience, commonly attracts little public attention. It is only when its summons comes to one who has held a distinguished place in human affairs, that it arrests for the moment the public thought. The death of Chief Judge RUGER is one of these occasions. He filled an office of the highest dignity. He stood as the representative of that department of government which more directly than any other is the guardian of personal rights and of the principles of social order. The

entire community look for and expect justice from the courts, and it is a cause for congratulation that as a rule this expectation has been realized.

"It is not strange, therefore, that the death of Judge RUGER has evoked from the press and public bodies in the community, where he lived and was personally known, expressions of warm personal regard, and also a general feeling throughout the state of the importance of this event, and of the public loss sustained in the death of an eminent judge.

"Judge RUGER came to the court without previous judicial experience. The same has been true of the larger number of those who, during its existence, have been elected members of the tribunal. Judge RUGER was the son of a lawyer, and when he was elected Chief Judge he had passed the meridian of life and brought to the discharge of his duties as judge a ripe experience at the bar, gained in a varied and important practice in one of our interior cities, in which he acquired a steadily growing reputation as an able and successful lawyer. His reputation was not local merely, but was known to the bar of the state, and he was made president of the State Bar Association. He never held any public office except that of Chief Judge, but he always took an active interest in public affairs and exercised a large influence in the counsels of the political party of which he was a member.

"The office of Chief Judge requires for its successful administration more than mere legal learning. He presides at the sessions of the court. He is brought into immediate contact with the members of the bar. To expedite the business of the court, while at the same time affording to lawyers all reasonable opportunity to present their case, and to impose restriction without creating a feeling that the privileges of counsel have been unduly curtailed, requires tact, a knowledge of human nature, and more than all, such a bearing on the part of the Chief Judge as will impress observers that the court is not seeking to gain time by abridging proper or necessary discussion. It is important in a court of last resort not only that cases should be correctly decided, but that its business should be so conducted that parties shall feel that they were afforded

a fair chance for the presentation of their cause. Judge RUGER presided in the court with rare dignity. He had an impressive presence. His large frame, his strong features, his deep set eyes shaded by heavy eyebrows, the lines of his mouth, expressive of firmness, all combined to give the impression of a strong personality. No lawyer at the bar of the court would presume to disregard any suggestion of the Chief as to the conduct of business, or trespass upon any rule which he had prescribed. Under him the business was conducted with order and dignity. His manner, though naturally grave and even severe, was but the accidental clothing of a really kind and genial nature. He had a quaint humor, which exhibited itself to those admitted to his intimacy.

"The judicial work of Judge RUGER is recorded in many volumes of our reports. This is not the place to review his judicial labors or to attempt to fix his place among the many able judges whose work has been ended by death. That he will maintain a rank among the men who have made the jurisprudence of New York illustrious, we cannot doubt. He reached conclusions after long and laborious investigation. His mind was not of that class which sees the end at the beginning, or rests satisfied with conclusions hurriedly reached. Each case with which he dealt was submitted to painstaking analysis, the authorities bearing upon it were patiently examined, opposing views were carefully considered, and when his conclusion was reached, it was not in his nature to see any other solution to the problem.

"It often happens that men of positive character or convictions have not the judicial spirit. But this may be evolved by experience, and it is truly a growth as in any evolution in material nature. Judge RUGER had strong prejudices and convictions, which sometimes may unconsciously have warped his judgment, but, as a rule, his opinions are characterized by broad and strong views, and leave nothing untouched which is pertinent to the case. His opinion on the power of the legislature over corporate property under the reserved power of the state to alter, amend or repeal corporate charters, rendered in what is known as the Broadway railroad case, and his opinion in the

Home insurance case, touching the distinction between a franchise and property tax, are examples of his broad and lucid reasoning and exhibit his great ability. We cannot, in a brief minute, do justice to the eminent man, now no more.

"Our main purpose is to put on record of the court an expression of our sense of the public loss sustained in the death of our lamented chief."

THE ORDER OF THE COURT.

The court then made the following order:

IN COURT OF APPEALS,
January 19, 1892.

It is ordered that in respect for the Hon. WILLIAM C. RUGER, late Chief Judge of this court, the court room and the chair lately used by him be draped in mourning for the space of thirty days, and that the judges of the court, the officers and attendants wear the usual badge of mourning for that space of time, and that the court adjourn from this day until the twentieth day of January, at 10 A. M.

Also, that the remarks made to-day by the senior associate judge be entered in the minutes of the court, and be published in the forthcoming volume of the reports of this court.

Also, that a copy of this order and those remarks be engrossed and duly certified by the clerk of the court and transmitted to the family of the late Chief Judge, with the heartfelt and deepest sympathy of the members of the court in their severe and sudden affliction.

The court thereupon adjourned until the twentieth day of January.

GORHAM PARKS, *Clerk.*

INDEX.

ACCOUNTING.

Plaintiff, being the owner of several letters patent for certain inventions, and being indebted to defendants, entered into a contract with them by which, to secure the payment of that indebtedness and of certain advances agreed to be made by them to him, he assigned to them two-thirds of his interests in said letters patent and the invention covered thereby; the said indebtedness and advances to be paid out of plaintiff's share of the profits and proceeds of sales of the patented articles. Defendants had the right under the contract to terminate it at any time, they, however, to retain their interest until they were fully paid, and upon such payment they agreed to re-assign. In an action to compel a re-assignment and for an accounting, an accounting was ordered. On the hearing before the referee it appeared that plaintiff, at defendants' request and upon their promise to pay him for his time, performed labor in perfecting improvements to one of the patented inventions. *Held*, that plaintiff was properly allowed upon the accounting the value of his labor. *Barry* v. *Colville*. 302

ADVERSE POSSESSION.

1. In an action of ejectment brought by the executors of H. to recover certain lots in the city of New York, these facts appeared: In 1843 W., who was the owner of the premises which were subject to a mortgage thereon, was declared a bankrupt, and his property passed into the hands of his assignee in bankruptcy. P., the mortgagee, thereafter commenced an action to foreclose the mortgage, to which the assignee, as such, was not made a party. In 1846 a decree of foreclosure and sale was rendered, the premises were sold, and purchased by P., to whom the master in chancery executed a deed purporting to convey the fee. P. entered into and continued in possession until his death in 1855. P. died intestate, and pursuant to a judgment in an action of partition between his heirs the premises were sold, and in 1859 conveyed to H., all of the heirs of P. uniting in the conveyance. Prior to this another action had been commenced by the administrator of P. against the said assignee to foreclose said mortgage, in the complaint in which the facts as to the prior foreclosure and sale and the possession by P. under it were recited. Judgment of foreclosure and sale was rendered and the premises were sold and conveyed to H. At the time of these conveyances to H. the premises were in the occupation of S., he having entered as tenant of P. S. thereafter continued in the occupancy as tenant at will of H. until 1865, when he transferred his occupancy to B., who went in and thereafter occupied the premises in the same manner as S. had done, *i. e.*, cultivating them as a vegetable garden, he claiming no other right or interest than as tenant at will of H., which tenancy was recognized and acquiesced in by the latter. B. died in 1872 or 1873, his widow continued in the occupation of the premises, cultivating it in the same manner, until the death of H. in 1884; in that year defendant took possession. *Held*, the evidence justified a finding that H. entered into and continued in possession from the time of the delivery of the deeds to him in 1859, until his death, he claiming to be the owner and holding the same adversely; and that, therefore, he acquired title by adverse possession. *Landon* v. *Townshend*. 166

2 In 1873 defendant received a deed of the premises from one claiming to own the equity of redemption; in 1875 she built a fence around them, her entry for that purpose being peaceful. It did not appear, however, that H. had any knowledge of this act of defendants; that it interfered in any way with the occupancy; that there was any change in the actual possession, or that the tenants then or thereafter recognized defendant as owner. *Held*, that the erection of the fence was not necessarily a legal, valid taking possession, and so a termination of the adverse possession of H., and the evidence justified a finding that it was a mere entry in opposition to the occupants, and so, not an interruption of the adverse possession. *Id.*

3. While proof of an open, exclusive and hostile occupation of premises for twenty years by one who entered under a claim of right and asserting title, to the knowledge and possible injury of the true owner, who during that time was capable of vindicating his right, raises a presumption of title by adverse possession, which if undisputed will require a finding to that effect; the presumption is not conclusive as against other and further facts, but serves only to impose upon the owner the burden of showing the true character of the possession, and where other facts appear tending to justify a conclusion that the possession was not adverse, the question becomes at least a mixed question of law and fact. *Am. B. N. Co.* v. *N. Y. El. R. R. Co.* 252

4. Under the Statute of Limitations an actual adverse title is not necessary to an adverse possession; a general assertion of ownership will suffice if there be color of title, however groundless in fact. *Id.*

5. *It seems*, the rule is different where a violation of the statute against champerty is set up. That can only be established by showing a possession under some specific title adverse to that of the grantor in the deed in question. *Id.*

6. Mere provisions in a corporate charter for compensation to the owner of property taken *in invitum* for corporate purposes do not necessarily make an entry by the corporation upon private property in subordination to the private right; such an entry may, notwithstanding the provisions, be adverse and such as may ripen into a prescriptive title. *Id.*

AGREEMENT.

See ASSIGNMENT (EQUITABLE).

ALBANY (CITY OF).

1. The provision of the charter of the city of Albany of 1883 (§ 2, title XI, chap. 298, Laws of 1883), providing that if, in the proceedings relative to an assessment for a local improvement in said city of Albany, "any fraud or defect in the work, or substantial error, shall be alleged to exist or have been committed, the party aggrieved thereby may apply to have the assessment vacated or reduced," and giving the county judge jurisdiction to entertain the application, applies only to assessments thereafter made. *In re D. & H. C. Co.* 105

2. Accordingly, *held*, that the county judge had no jurisdiction to entertain an application to vacate an assessment made, completed and confirmed prior to the enactment of said charter. *Id.*

ALIMONY.

1. Alimony awarded to an innocent wife by a court of equity, as incidental to a decree of divorce in her favor, is simply an allowance for her support and maintenance; the awarding it is not the enforcement of a debt due to her from her husband, but of the marital obligation of support from which the husband, because of his misconduct, is not relieved by the decree; which obligation is made specific and is measured by the court. The allowance made becomes a debt only in the sense that the general duty over which he had a discretionary control has been

changed into a specific duty. (Code Civ. Pro. § 1759.) *Romaine* v. *Chauncey*. 566

2. While, therefore, alimony is in one sense property of the wife, it is a specific fund provided for a specific purpose only, whose express limitations take it out of the general law of property, and as it is created by equity, it should have the protection of equity, so that it may not be perverted to a purpose for which it was not intended. *Id.*

3. Accordingly *held*, that the court would not lend its aid to compel the appropriation of alimony awarded to a wife in a decree of divorce to the payment of a debt contracted by her and actually subsisting prior to the date of the decree. *Id.*

4. *It seems*, a court of equity when applied to for its active assistance in the enforcement of a claim founded upon a bare legal right, will either refuse its aid where granting it will work injustice, or will impose conditions calculated to mitigate or remove the injustice. *Id.*

APPEAL.

1. In an action by a stockholder of a gas-light company, to prevent its consolidation with an electric light, heat and power company, the complaint alleged that the proposed consolidation, if carried out, would be ruinous to the stockholders of plaintiff's company; that the two corporations are not so similar as to come within the act authorizing the consolidation of manufacturing corporations (Chap. 367, Laws of 1884); that that act is permissive merely and does not exclude the interference of the court to prevent a wrong and injustice and is, in some of its features, unconstitutional. No answer was interposed and upon the complaint and affidavits of plaintiff and defendant's treasurer and president, and after hearing both parties an injunction *pendente lite* was granted restraining the consolidation. *Held*, an order of General Term affirming the order of the Special Term was not reviewable here. *Young* v. *R. & K. G. L. Co.* 57

2. In an action by an abutting owner to restrain the operation of an elevated railroad in a city street, the uncontradicted evidence showed, and the defendants' counsel requested the court to find, that the existence and operation of the railroad had greatly increased the population of the locality in which plaintiff's property is situated, and has brought traffic into the street, and thereby plaintiff's property has been incidentally benefited, and that there has been a general rise in the value of the real estate along the street, largely attributable to the road. The court refused so to find, and defendants excepted. Defendants also moved for a dismissal of the complaint on the merits, upon the ground, among others, that it appeared plaintiff's property had been benefited by the road, and had, by reason thereof, increased in value since its erection, which motion was denied and exceptions taken. The court found that plaintiff had sustained damage to an amount stated. *Held*, that the exceptions were sufficient to bring up the question as to whether the court had adopted the proper rule of damages. *Bohm* v. *M. E. R. Co.* 576

3. Only questions of law raised by exceptions taken during the progress of the trial can be reviewed in this court. *Wicks* v. *Thompson*. 634

4. Where, therefore, the record on appeal to this court contains no exceptions, the denial of a motion for a new trial is not the subject of review here. *Id.*

—— *Where the amount of allowances to which a trustee is entitled for costs and expenses incurred by him in securing or preserving the trust fund, has been determined by the Supreme Court on conflicting evidence, this court has no power to review the determination. See Woodruff* v. *N. Y., L. E. & W. R. R. Co.* 27

——*When question as to appropriateness of remedy, not having been raised below, may not be considered here.*
See Wilcox v. *City of Rochester*. 247

ASSESSMENT AND TAXATION.

1. The lands of a cemetery association, organized under the act of 1847 (Chap. 133, Laws of 1847), by virtue of the provision thereof (§ 10), which declares that the cemetery lands and property of any association formed under the act shall be exempt from taxation, are exempt from the moment they are acquired by the association, and continue exempt so long as the corporation exists, although no dead body is buried therein, and although by a valid ordinance, passed after its incorporation by a municipality within whose limits its lands lie, the burial of the dead therein is forbidden. *People ex rel.* v. *Pratt*. 68

2. The exemption from taxation given by said act of 1847, is not affected by the amendment thereto of 1869 (Chap. 708, Laws of 1869). *Id.*

3. Nor is such exemption affected by the act of 1879, in relation to lands used for cemetery purposes (Chap. 310, Laws of 1879); that act relates to cemeteries other than those established under the act of 1847. *Id.*

4. Accordingly, *held*, where a cemetery association, incorporated under said act of 1847, had purchased lands for cemetery purposes within the limits of said city, and under the city ordinances then existing, the burial of the dead therein was permitted, but there after an ordinance was passed prohibiting such burial, that although the ordinance was valid and no burials could be made in said lands while it remained in force, an assessment of said lands for the purposes of taxation was illegal. *Id.*

5. The provision of the charter of the city of Albany of 1883 (§ 2, tit. XI, chap. 298, Laws of 1883), providing that if, in the proceedings relative to an assessment for a local improvement in said city of Albany, "any fraud or defect in the work, or substantial error, shall be alleged to exist or have been committed, the party aggrieved thereby may apply to have the assessment vacated or reduced," and giving the county judge jurisdiction to entertain the application, applies only to assessments thereafter made. *In re D. & H. C. Co.* 105

6. Accordingly, *held*, that the county judge had no jurisdiction to entertain an application to vacate an assessment made, completed and confirmed prior to the enactment of said charter. *Id.*

7. Residence of the owner within the assessment district is essential, under the Revised Statutes (1 R. S. 389, § 5), to give jurisdiction to assessors to make a valid assessment of personal property. *Wilcox* v. *City of Rochester*. 247

8. In an action to vacate an assessment, and to set aside a sale made thereunder, it appeared that the assessors of the city of R. assessed plaintiff in the Seventh ward of said city for property, real and personal; that the real property was situated therein, but plaintiff, although formerly a resident of said ward, was not a resident thereof at the time, but of the Fourth ward in said city; he tendered the amount of the tax on the land with collection fees; this was refused, and the real estate was sold by the city treasurer to defendant for the full amount of the tax, real and personal. *Held*, that the assessment of the personal property was void; and so, the tax assessed thereon and the sale were properly set aside; also that it was immaterial that the assessors were ignorant of plaintiff's change of residence, at least in the absence of proof of any effort on his part to mislead them. *Id.*

9. Also *held*, the claim that as the assessors acted for the whole city, they had jurisdiction of the persons, of all taxable inhabitants therein, including plaintiff, and

that, therefore, the assessment was irregular only, was not tenable. *Id.*

10. Also *held*, that the question as to the appropriateness of the remedy not having been raised below, could not be considered here. *Id.*

11. While the legislature may fix the aggregate amount of a local tax and the area of assessment upon which it shall be imposed, as in so doing it determines a public question upon considerations of public interest and welfare, it cannot provide for the apportionment of the tax among the persons assessed, without also providing for notice or a hearing on the part of the taxpayer, as thereby a personal liability and a lien upon his property are initiated in relation to which he has a right to be heard. *In re Trustees Union College.* 308

12. The legislature cannot validate an act, invalid because it provides for the apportionment of such a tax without notice, by simply re-enacting the act. *Id.*

13. Water-rates imposed, pursuant to a city charter, upon lots within the municipal limits, are a tax assessed against the owners or occupants. *Id.*

14. Accordingly *held*, that the provisions of the charter of Long Island City, in reference to its water supply (Tit. 10, chap. 461, Laws of 1871), which provide for the apportionment and assessment of water-rates upon lots, without giving to the owners or occupants an opportunity for a hearing, were unconstitutional, and that assessments made under it were void. *Id.*

15. Also *held*, that assessments made under said charter were not validated by the acts of 1882 (Chap. 383, Laws of 1882), or of 1886 (Chap. 656, Laws of 1886). *Id.*

16. Upon appeal from an order in proceedings instituted under said act of 1886 (§ 10), to vacate an assessment, it was claimed that the remedy given by the act was inapplicable, as the alleged invalidity, *i. e.*, that an assessment could not be made upon vacant lots, did not appear upon the face of the proceedings. The assessment-rolls were not printed in the return. *Held*, that the objection was untenable; that as the form of the assessment roll dictated by the charter would show, on its face, whether the rates were assessed against a village or a vacant lot, it was to be assumed that the fact appeared in the proper columns. *Id.*

17. But *held*, that the assessment was equally void whether the lands were vacant or had buildings upon them; and that it was immaterial whether the water was used or not. *Id.*

18. Also *held*, that the provision of said act of 1886 (§ 10), which requires any action or proceeding to test the validity or regularity of a tax, assessment or water-rate to be commenced within one year from the time of the delivery of the roll to the treasurer, is not retroactive, and so did not cut off the right to question a tax, where the time limited had expired prior to the passage of the act; that the limitation only applies to subsequent taxes and assessments. *Id.*

19. While *it seems* when two or more domestic corporations are consolidated, under the act of 1869 (Chap. 917, Laws of 1869), the resulting entity may properly be said to be a corporation "incorporated by and under a general and special law of this state," within the meaning of the "act to tax stock corporations for the privilege of incorporation" (Chap. 143, Laws of 1886), and so subject to the tax imposed by said act, when the consolidation is of a domestic corporation with a corporation of another state whose legislature has sanctioned such a consolidation, as the new corporation owes its existence, not to the state law alone, but to the concurrent legislation of the two states, it is not liable to such tax. *People* v. *N. Y., C. & St. L. R. R. Co.* 474

20. The relator, a domestic corporation, organized under the General Manufacturing Act (Chap. 40, Laws of 1848), is engaged in the business of producing electricity and supplying the same to cus-

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21. The decision [illegible] e by the comptroller upon application of the relator, under the amendatory act of 1889 (Chap 463, Laws of 1889), which authorizes the comptroller to revise and re-adjust any account for taxes settled by any corporation. The account against the relator was settled by the comptroller July 3, 1889, immediate notice of the assessment was given to it, and, after the expiration of thirty days, no proceedings having been taken to review the same, as provided by said act of 1881 (§ 17), as amended in 1885 (Chap 501, Laws of 1885), the comptroller issued his warrant for the collection of the tax. It was claimed on behalf of the defendant that the relator had, by the delay, lost his right of review by certiorari. *Held*, untenable. *Id*

22. The relator, up to the time the tax was so settled and adjusted in 1889, had made no reports and paid no taxes. It was claimed by defendant that the relator had another remedy, that is, by appeal from the determination of the comptroller to a board constituted for that purpose by the act of 1881 (§ 1), and so that under the provision of the Code of Civil Procedure (§ 2122), which provides that, except when otherwise prescribed by statute, a writ of certiorari may not be issued to review any determination which can be adequately reviewed upon appeal, to any body [illegible] dicer. *Held*, untenable; that [illegible] said provision for appeal did [illegible] apply to a case where the corporation claiming it was not subject to any tax whatever, and had made no report, but simply to cases where reports having been made, the comptroller, not satisfied therewith, has proceeded to make a valuation of his own, and settled an account against the corporation on that valuation; that the valuation and determination in question was made, not under the section of said act containing said provision for appeal, but under a section (§ 12) added by the amendatory act of 1882 (Chap. 151, Laws of 1882), as amended in 1885 (Chap. 501, Laws of 1885); and so that, as by the act of 1889, under which the application was made (§ 20), express provision is made for review by certiorari of the action of the comptroller, the relator was entititled to the writ. *Id.*

23. Upon application of the relator, a domestic corporation, to the state comptroller, for a revision and re-adjustment of the account of taxes settled against it pursuant to the act providing for taxing certain corporations (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881; chap. 151, Laws of 1882, and chaps. 359 and 501, Laws of 1885), it appeared by the relator's certificate of incorporation that it was incorporated for the purpose of carrying on some part of its business out of the state, but that its operations were to be conducted and carried on and its principal place of business was to be in the state. During three years, for which taxes were imposed, it was engaged in business out of the state, but it had its office in the state and kept its bank accounts here. It made annual reports to the comptroller, by which it appeared that dividends were declared and paid upon its capital during those years, and the comptroller based his adjustment of the account of taxes upon the amount of capital employed in this state, which he determined from the average monthly balances in the New York banks, and the expenditures for the maintenance of its office here. *Held*, that there

was sufficient evidence upon which the comptroller could act in finding a basis for assessment; and that the tax was properly imposed. *People ex rel.* v. *Wemple.* 558

24. The qualifying words, "and doing business in this state," in the provision of said act (§ 3), subjecting to the tax prescribed, every corporation not excepted from its operation, which is "incorporated or organized by or under any law of this state, or * * * under the laws of any other state or country, *and doing business in this state*," have reference only to foreign corporations. *Id.*

25. As to corporations organized under the laws of this state, the legislative power to tax their business and franchises is general; but as to foreign corporations, the jurisdiction is gained from the business which they do in this state, and the tax is upon that business. *Id.*

26. The tax imposed by said act is not upon the property of the corporations, but upon their franchises and business; and as to domestic corporations, is in no sense restricted to such as do business in this state. *Id.*

27. Where a corporation is subject to taxation under said act, the determination of the comptroller as to the assessment and taxation, unless clearly shown to be erroneous, will not be disturbed. *Id.*

28. Where a corporation was organized under the act of 1848 (Chap. 87, Laws of 1848), providing for the incorporation of gas companies, but under the authority given by the act of 1879 (Chap. 512, Laws of 1879), was exclusively engaged in generating and supplying electric currents for the purpose of illumination, *held*, that it was a manufacturing corporation within the meaning of the exemption clause of the act providing for the assessment and taxation of certain corporations (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881), and so was exempt from taxation prior to the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause; that the fact that the corporation was not organized under the General Manufacturing Act did not affect its character as a manufacturing corporation. *People ex rel.* v. *Wemple.* 664

ASSIGNMENT.

1. A conveyance, absolute upon its face, may be shown by parol or extrinsic evidence to be in reality merely a security, and to that end it is not essential to show fraud or mistake in the inception of the instrument. *Barry* v. *Colville.* 302

2. Plaintiff, being the owner of several letters patent for certain inventions, and being indebted to defendants, entered into a contract with them by which, to secure the payment of that indebtedness and of certain advances agreed to be made by them to him, he assigned to them two-thirds of his interests in said letters patent and the invention covered thereby, the said indebtedness and advances to be paid out of plaintiff's share of the profits and proceeds of sales of the patented articles. Defendants had the right under the contract to terminate it at any time, they, however, to retain their interest until they were fully paid, and upon such payment they agreed to reassign. In an action to compel a reassignment and for an accounting, it appeared that plaintiff, before the termination of the contract, executed to defendants, without consideration, a deed, by its terms conveying to them, for a nominal consideration, two-thirds of his interest in one of the letters patent. *Held*, the evidence justified a finding that the transfers, both the deed and the assignment, were intended merely as security; and that plaintiff was entitled to a reconveyance, upon payment being made to defendants as specified in the contract. *Id.*

ASSIGNMENT (EQUITABLE).

1. To constitute an equitable assignment there must be a purpose to pass a present interest; this, however, may be absolute or qualified, *i. e.*, a right to the immediate pos-

tomers for lighting purposes. In proceedings to review by certiorari a decision of the comptroller holding the relator liable to pay taxes and penalties imposed by the act of 1880, providing for the assessment and payment of taxes by certain corporations (Chap. 542, Laws of 1880), and the act of 1881, amending the same (Chap. 361, Laws of 1881), *held*, that it was a manufacturing corporation within the meaning of the provision of said act exempting such corporations, and so was exempt from taxation until the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause. *People ex rel.* v. *Wemple*. 543

21. The decision was made by the comptroller upon application of the relator, under the amendatory act of 1889 (Chap. 463, Laws of 1889), which authorizes the comptroller to revise and re-adjust any account for taxes settled by any corporation. The account against the relator was settled by the comptroller July 3, 1889, immediate notice of the assessment was given to it, and, after the expiration of thirty days, no proceedings having been taken to review the same, as provided by said act of 1881 (§ 17), as amended in 1885 (Chap. 501, Laws of 1885), the comptroller issued his warrant for the collection of the tax. It was claimed on behalf of the defendant that the relator had, by the delay, lost his right of review by certiorari. *Held*, untenable. *Id.*

22. The relator, up to the time the tax was so settled and adjusted in 1889, had made no reports and paid no taxes. It was claimed by defendant that the relator had another remedy, that is, by appeal from the determination of the comptroller to a board constituted for that purpose by the act of 1881 (§ 1), and so that under the provision of the Code of Civil Procedure (§ 2122), which provides that, except when otherwise prescribed by statute, a writ of certiorari may not be issued to review any determination which can be adequately reviewed upon appeal, to any body or officer. *Held*, untenable; that the said provision for appeal did not apply to a case where the corporation claiming it was not subject to any tax whatever, and had made no report, but simply to cases where reports having been made, the comptroller, not satisfied therewith, has proceeded to make a valuation of his own, and settled an account against the corporation on that valuation; that the valuation and determination in question was made, not under the section of said act containing said provision for appeal, but under a section (§ 12) added by the amendatory act of 1882 (Chap. 151, Laws of 1882), as amended in 1885 (Chap. 501, Laws of 1885); and so that, as by the act of 1889, under which the application was made (§ 20), express provision is made for review by certiorari of the action of the comptroller, the relator was entititled to the writ. *Id.*

23. Upon application of the relator, a domestic corporation, to the state comptroller, for a revision and readjustment of the account of taxes settled against it pursuant to the act providing for taxing certain corporations (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881; chap. 151, Laws of 1882, and chaps. 359 and 501, Laws of 1885), it appeared by the relator's certificate of incorporation that it was incorporated for the purpose of carrying on some part of its business out of the state, but that its operations were to be conducted and carried on and its principal place of business was to be in the state. During three years, for which taxes were imposed, it was engaged in business out of the state, but it had its office in the state and kept its bank accounts here. It made annual reports to the comptroller, by which it appeared that dividends were declared and paid upon its capital during those years, and the comptroller based his adjustment of the account of taxes upon the amount of capital employed in this state, which he determined from the average monthly balances in the New York banks, and the expenditures for the maintenance of its office here. *Held*, that there

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24. The qualifying words, "and doing business in this state," in the provision of said act (§ 3), subjecting to the tax prescribed, every corporation not excepted from its operation, which is "incorporated or organized by or under any law of this state, or * * * under the laws of any other state or country, *and doing business in this state*," have reference only to foreign corporations. *Id.*

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28. Where a corporation was organized under the act of 1848 (Chap. 37, Laws of 1848), providing for the incorporation of gas companies, but under the authority given by the act of 1879 (Chap. 512, Laws of 1879), was exclusively engaged in generating and supplying electric currents for the purpose of illumination, *held*, that it was a manufacturing corporation within the meaning of the exemption clause of the act providing for the assessment and taxation of certain corporations (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881), and so was exempt from taxation prior to the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause; that the fact that the corporation was not organized under the General Manufacturing Act did not affect its character as a manufacturing corporation. *People ex rel.* v. *Wemple.* 664

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ASSIGNMENT (EQUITABLE).

1. To constitute an equitable assignment there must be a purpose to pass a present interest; this, however, may be absolute or qualified, *i. e.*, a right to the immediate pos-

session and enjoyment, or a right to such enjoyment postponed until the occurrence of some future event. It may also be made subject to such limitations, conditions and qualifications as might be inserted in a conveyance or assignment of the legal estate in the same subject. *Holmes* v. *Evans*. 140

2. Defendants held certain claims which were doubtful and complicated, and not having the means to defray the expenses of litigations to collect them, they entered into an agreement with plaintiffs, a firm of lawyers, by which the latter were to undertake the collection, they to "receive upon settlement or recovery" a specified percentage of "such recovery or settlement in kind." All money or property received to be divided between the parties in the proportions specified; defendants reserving the right to substitute a cash compensation for a compensation in kind. A settlement proposed by plaintiffs not being approved of by defendants, they requested defendants to substitute another attorney, stating, however, if a settlement was made upon substantially the same terms as those rejected, they would be entitled to the agreed compensation. A substitution was made as requested. Defendants thereafter effected a settlement of the claims. In an action to compel the performance of the agreement by the delivery to plaintiffs of the specified proportion of the property received on the settlement, *held*, that the agreement amounted to an equitable assignment; but that, having failed to render the services, the agreement to perform which was the consideration for and, in effect, a condition of the assignment, their equitable right was thereby defeated; that their withdrawal amounted to an abandonment of the contract and a forfeiture of all rights under it. *Id.*

ASSIGNMENT (FOR BENEFIT OF CREDITORS).

1. The provision of the General Assignment Act (Chap. 466, Laws of 1877, as amended by chap. 328, Laws of 1884, chap. 283, Laws of 1886 and chap. 503, Laws of 1887) invalidating preferences in an assignment for the benefit of creditors except to the amount of one-third the net value of the assigned estate, was not intended to and does not prevent a creditor from obtaining payment of, or security and thereby a preference for, his debt even from an insolvent debtor, and while *it seems*, if he accepts such a security with knowledge that the debtor intends to make an assignment, that the security was executed in contemplation thereof, and that it will result in a violation of the provision of the act, the security will be void; if the creditor accepts it in ignorance of any such existing intent on the part of the debtor, the provision does not apply, and the security is not rendered invalid by the fact that the debtor does thereafter execute an assignment. *Manning* v. *Beck*. 1

2. Where an assignment for the benefit of creditors, executed by the members of a firm, by its terms assigned all the partnership property and the individual estate of each of the assignors, and, after preferring certain firm creditors, directed the assignee with the residue to pay in full all other debts and liabilities of the assignors, "together or respectively," and if the residue was insufficient, to apply it toward such payment "ratably and in proportion," and it appeared that there were individual debts, *held*, that the assignment was upon its face fraudulent and void as to firm creditors, as its effect was in one contingency to devote part of the partnership property to the payment of individual debts of the assignors before payment in full of all the partnership debts; also that it was not validated by the fact that the assets were insufficient to pay the preferred debts. *Boos* v. *Marion*. 536

ATTORNEYS.

A life insurance association, which proposed to issue certificates of membership to those becoming

members, with a statement in each certificate that certain sums received thereon should be paid over to a trust company, as a safety fund for the security of the members, to be paid out by the trustee in the manner specified, entered into a contract with the trust company, by which the latter agreed to receive and hold this fund and pay it out in the manner and for the purposes so specified. In proceedings for a voluntary dissolution of the corporation, a receiver was appointed. The trust company, in pursuance of a Special Term order, made without notice to it, paid over the fund to the receiver. The receiver had, in good faith and under the direction of the court, paid out a portion of the fund, before the making of a motion for an order requiring him to pay it back. Payments were so made by him to the attorneys in the dissolution proceedings for their fees. *Held*, that an order was proper requiring said attorneys to pay back to the receiver the moneys so received by them, and directing him, upon receipt thereof, to pay them over to the trust company. *In re H. P. S. F. Assn.* 288

ATTORNEY AND CLIENT.

1. Trustees and, *it seems*, others acting in a fiduciary character, are entitled to reasonable allowances for costs and expenses incurred in the course of the performance of their duties, out of a fund which has been secured or protected by their efforts. This right includes all reasonable fees paid attorneys and counsel for services in litigations successfully prosecuted for the benefit of the fund. *Woodruff* v. *N. Y., L. E. & W. R. R. Co.* 27

2. Defendant held certain claims which were doubtful and complicated, and not having the means to defray the expenses of litigation to collect them, they entered into an agreement with plaintiffs, a firm of lawyers, by which the latter were to undertake the collection, they to "receive upon settlement or recovery" a specified percentage of "such recovery or settlement in kind." All money or property received to be divided between the parties in the proportions specified; defendants reserving the right to substitute a cash compensation for a compensation in kind. A settlement proposed by plaintiffs not being approved of by defendants, they requested defendants to substitute another attorney, stating, however, if a settlement was made upon substantially the same terms as those rejected, they would be entitled to the agreed compensation. A substitution was made as requested. Defendants thereafter effected a settlement of the claims. In an action to compel the performance of the agreement by the delivery to plaintiffs of the specified proportion of the property received on the settlement, *held*, that the agreement amounted to an equitable assignment; but that, having failed to render the services, the agreement to perform which was the consideration for and, in effect, a condition of the assignment, their equitable right was thereby defeated; that their withdrawal amounted to an abandonment of the contract and a forfeiture of all rights under it. *Holmes* v. *Evans.* 140

3. Plaintiff, a lawyer, was jointly interested with H. who was not a lawyer, in making certain collections for defendant; he also conducted litigations for defendant not connected with the collections. In an action to recover for professional services, defendant claimed that under an arrangement with H. it was agreed that plaintiff's fees were to be contingent upon a recovery. *Held*, the fact that plaintiff and H. were jointly interested in making collections did not authorize the latter to bind plaintiff by a contract for his professional services in other matters, and it having been found that H. had no authority to make the contract and that it was not subsequently ratified by plaintiff, he was entitled to recover. *Leavitt* v. *Chase.* 660

BANKRUPTCY.

1. A judgment recovered on an indebtedness incurred by defendant

because of his failure to pay over rents collected by him as agent is barred by his discharge in bankruptcy. *Mulock* v. *Byrnes.* 23

2. The cause of action in such a case is not a debt created by defendant "while acting in a fiduciary capacity" within the meaning of the provision of the Bankrupt Act, declaring that such a debt shall not be discharged by bankruptcy proceedings. (U. S. R. S. § 5117.) *Id.*

3. *It seems* said provision does not apply to cases of implied, but only to those technical trusts which are actually and expressly constituted by the parties. *Id.*

4. Where the owner of the equity of redemption of mortgaged premises becomes bankrupt and his estate has passed into the hands of an assignee in bankruptcy, to cut off the interest of the latter by a foreclosure of the mortgage, he must be made a party defendant to the foreclosure suit in his representative or official capacity, or it must appear in some way on the face of the proceedings that they relate to or affect the bankrupt's estate; the fact that he was made a party individually is not sufficient, nor is it material that he knew the foreclosure related to lands owned by the bankrupt, and that he had no interest therein save as assignee. *Landon* v. *Townshend.* 166

BILLS, NOTES AND CHECKS.

1. Negotiable paper, transferred as security for or in nominal payment of interest to accrue upon an antecedent debt, is subject to all the equities existing between the original parties to it and to any defenses which would have been available to the maker had the paper not been transferred. *Leslie* v. *Bassett.* 523

2. Where, although there was a good consideration for a draft when it was accepted, but subsequently such consideration entirely failed, *held*, that the failure of consideration was a good defense to any action upon the paper brought by the transferee. *Id.*

3. The American Exchange, a banking corporation, in pursuance of an agreement with B. & Co. accepted a draft drawn by A. & Co. for the amount of goods purchased of that firm by B. & Co., to which was attached a bill of lading of the goods, running in the name of B. & Co., and to reimburse it drew upon the latter firm for the same amount, with commissions added, payable before the maturity of the draft drawn by A. & Co. Said draft was accepted by B. & Co., and was transferred to plaintiff, who had loaned money to the Exchange as a security for or a conditional payment of interest to accrue upon her loan. Within two days thereafter the Exchange became insolvent and A. & Co.'s draft was never paid. In an action against B. & Co. upon their acceptance, *held*, that plaintiff was not a *bona fide* holder for value; that the consideration having failed the Exchange could not enforce the draft, nor could the plaintiff, who succeeded to its rights, and so, that the action was not maintainable. *Id.*

BOARD OF COUNTY CANVASSERS.

See ELECTION (OF OFFICERS).

BOARD OF STATE CANVASSERS.

See ELECTION (OF OFFICERS).

BONA FIDE HOLDER.

The American Exchange, a banking corporation, in pursuance of an agreement with B. & Co., accepted a draft drawn by A. & Co. for the amount of goods purchased of that firm by B. & Co., to which was attached a bill of lading of the goods, running in the name of B. & Co., and to reimburse it drew upon the latter firm for the same amount, with commissions added, payable before the maturity of the draft drawn by A. & Co. Said draft was accepted by B. & Co., and was transferred to plaintiff, who had loaned money to the Exchange as

security for or a conditional payment of interest to accrue upon her loan. Within two days thereafter the Exchange became insolvent and A. & Co.'s draft was never paid. In an action against B. & Co. upon their acceptance, *held*, that plaintiff was not a *bona fide* holder for value; that the consideration having failed, the Exchange could not enforce the draft, nor could the plaintiff, who succeeded to its rights, and so, that the action was not maintainable. *Leslie* v. *Bassett*. 523

BOND.

1. The execution of a bond to a sheriff indemnifying him against damages resulting from an unlawful levy and sale of property made by him, presumptively establishes the liability of the obligors as principals for the original trespass committed by the sheriff. *Dyett* v. *Hyman*. 351

2. Those thus connected with the original wrong are jointly and severally liable with the sheriff, and it is no defense, in an action by the owner of the property against one or more of the wrongdoers, to show that others were not joined as defendants who are also liable. *Id*.

3. The provisions of the Code of Civil Procedure (§§ 1421–1423), giving the indemnitors the right to be substituted in such an action as defendants in place of the sheriff, do not have the effect to limit the liability of the indemnitors to the amount they would be liable, in an action by the sheriff, upon their bond, and in no way affect or vary the rights of the injured party; their liability to him rests wholly upon their participation in the original trespass. *Id*.

BURDEN OF PROOF.

Plaintiff contracted to sell and convey to defendant B. certain premises, he to take a mortgage thereon to secure part of the purchase-money. B. assigned the contract to defendant C. to whom plaintiff conveyed the premises, and C. subsequently conveyed them to B. At the time of the conveyance a street railroad encroached upon the premises. This trespass was unintentional and grew out of uncertainty as to the lines of an unopened street. B. required and plaintiff executed to him in connection with the deed a covenant to have the railroad company within thirty days execute as lessee a lease of the land occupied by its tracks or to have them removed; also to indemnify B. "from all loss or damage which may arise from the encroachment of the tracks, * * * including loss of profits in any future transaction in respect to said lands." Negotiations were immediately opened with the company for a lease which were delayed beyond the thirty days, the limitation of time, however, having been waived by B. The tracks were subsequently removed, but before this B. contracted to sell said lands at an advance of $36,000. In an action to foreclose the mortgage, defendant set up as a counter-claim the covenant and the contract of sale, alleging that his vendee upon tender of a deed, with covenants of warranty, of quiet enjoyment and against incumbrances, refused to perform because of the encroachment. B. claimed to recover the $36,000 as damages for breach of the covenant. *Held*, that the burden was upon B. of showing that the loss of profits was caused by the encroachment; that as this was simply a trespass not amounting to an eviction, and under no claim of right, the covenants in B.'s deed were not broken thereby, and it did not excuse his vendee from performance of his contract, and so he failed to show a loss occasioned thereby; also that B. could have removed or ended the encroachment. *Horton* v. *Bauer*. 148

CANALS.

1. The provision of the act "to establish and maintain a water department in the city of Syracuse" (§ 18, chap. 291, Laws of 1889, as amended by chap. 314, Laws of 1890), which authorizes

the city to take water from Skaneateles lake, is not repugnant to the constitutional provision (Art. 7, § 6) which prohibits the legislature from selling, leasing or otherwise disposing of the Erie and certain other canals; it appearing that, while the lake had been appropriated by the state "for a reservoir and feeder to the Erie canal," the water accumulated therein was in excess of that needed for canal purposes; that large quantities were permitted to flow from the lake which were not utilized by the state, much more than is authorized by the act to be taken from the lake for city purposes, and that the act only authorizes the taking of water not required for the use of the canal; the provision did not sell or authorize the sale, nor did it lease the waters of the lake, but operated merely as a license to the city to take water not needed by the state, subject to the paramount right of the state to resume it at any time. *Sweet* v. *City of Syracuse*. 316

2. The selling or leasing to, and the use by riparian owners or cities, of so much of the waters of streams and lakes appropriated as feeders and reservoirs for the canals as is not needed for the use of the canals, subject to the paramount rights of the state, is not inconsistent with the public use, and an act authorizing it is not in conflict with said provision. *Id.*

3. So, also, the legislature may authorize the sale of state property once appropriated and used for the canals, but no longer required for canal purposes. *Id.*

4. In an action to restrain said city, its officials and the water board created by said act, from carrying into effect or exercising the powers conferred by it, it was conceded that neither the original act, nor the act amending the same, received the vote of two-thirds of the members elected to each house, and it was claimed that the provision of the act above referred to (§ 18) was violative of the provision of the Constitution (Art. 1, § 9), declaring that the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating public moneys or property for local or private purposes. *Held*, untenable; that the state never acquired the ownership of the mass of water in the lake, but simply the right to the use of so much as is necessary for canal purposes; and that the condition of the grant to the city in the act was such that no property right or interest which the state owned was transferred, lost or impaired. *Id.*

5. Also *held*, that conceding the state owned the soil of the bed of the lake, this was subject to every easement and servitude necessary to the use of the waters by other riparian owners, so far as they may be entitled to use the same; and that a use of the soil under water for the purpose of placing a pipe therein was no invasion of any exclusive property right the state has in such soil. *Id.*

CANANDAIGUA (VILLAGE OF).

1. Under the act of 1854 (§ 1, chap. 352, Laws of 1854), "enlarging the powers and duties of the trustees" of the village of Canandaigua, the jurisdiction of said trustees with respect to the village streets and sidewalks became absolute, like that of commissioners of highways; by virtue of this enlarged jurisdiction they were invested with general powers and corresponding duties, and the responsibility for their proper performance devolved upon the municipal corporation as such. *McSherry* v. *Village of Canandaigua*. 612

2. Accordingly *held*, that the village was liable for injuries caused by neglect on the part of the trustees to keep a sidewalk in repair. *Id.*

3. The neglect complained of was in not repairing a defective and unsafe grating in a sidewalk, through which plaintiff fell and was injured. It appeared that notice of the dangerous condition of the grating had been given some time prior to the accident to

one C., who, it was admitted, was "the street commissioner of the village," being employed, as the evidence showed, to superintend and examine the streets and sidewalks. *Held*, that notice to him was sufficient notice to the corporation. *Id.*

CASES REVERSED, DISTINGUISHED, ETC.

Berger v. *Varrelmann* (127 N. Y. 281), distinguished and limited. *Manning* v. *Beck*. 7

White v. *Cotzhausen* (129 U. S. 329), distinguished. *Manning* v. *Beck*. 14

Bertles v. *Nunan* (92 N. Y. 152), distinguished. *Jooss* v. *Fey*. 21

Lent v. *Howard* (89 N. Y. 169), distinguished. *Woodruff* v. *N. Y., L. E. & W. R. R. Co.* 37

Walsh v. *Sayre* (52 How. Pr. 334), overruled. *McQuigan* v. *D., L. & W. R. R. Co.* 52

Schroeder v. *C., R. I. & C R. R. R. Co.* (47 Ia. 375), disapproved. *McQuigan* v. *D., L. & W. R. R. Co.* 52

Briggs v. *Morgan* (2 Hagg. Cons. Ct. 324), distinguished. *McQuigan* v. *D., L. & W. R. R. Co.* 54

Devanbagh v. *Devanbagh* (5 Paige, 554), distinguished. *McQuigan* v. *D., L. & W. R. R. Co.* 54

Newell v. *Newell* (9 Paige, 25), distinguished. *McQuigan* v. *D., L. & W. R. R. Co.* 54

Fettrich v. *Leamy* (9 Bos. 510), distinguished. *Hammann* v. *Jordan*. 66

Roberts v. *N. Y. E. R. Co.* (128 N. Y. 455), distinguished. *Mortimer* v. *Manhattan R. Co.* 85

Chapman v. *McCormick* (86 N. Y. 479), distinguished. *O'Neil* v. *D. D., E. B. & B. R. R. Co.* 130

Hume v. *Mayor, etc.* (74 N. Y. 264), distinguished. *Hoey* v. *Gilroy*. 139

Broiestedt v. *S. S. R. R. Co.* (55 N. Y. 220), distinguished. *Am. Bk. Note Co.* v. *N. Y. E. R. R. Co.* 263

Baldwin v. *Calkins* (10 Wend. 169), distinguished. *Am. Bk. Note Co.* v. *N. Y. E. R. R. Co.* 266

Matter of U., C. & S. V. R. R. Co. (56 Barb. 486), disapproved. *Am. Bk. Note Co.* v. *N. Y. E. R. R. Co.* 273

Matter of N. Y. C. & H. R. R. R. Co. (15 Hun, 63), disapproved. *Am. Bk. Note Co.* v. *N. Y. E. R. R. Co.* 273

In re N. Y. L. & W. R. R. Co. (29 Hun 1), disapproved. *Am. Bk. Note Co.* v. *N. Y. E. R. R. Co.* 273

Murray v. *Hay* (1 Barb. Ch. 59), distinguished. *Lynch* v. *M. E. R. Co.* 286

Hudson v. *Caryl* (44 N. Y. 553), distinguished. *Lynch* v. *M. E. R. Co.* 286

In re Atty.-Genl. v. *G. M. Life Ins. Co.* (77 N. Y. 272), distinguished. *In re H. P. S. F. Assn.* 299

Spencer v. *Merchant* (125 U. S. 345), distinguished. *In re Trustees Union College*. 313

Sweet v. *City of Syracuse* (60 Hun, 28), reversed. *Sweet* v. *City of Syracuse*. 316

People v. *N. Y., C. & St. L. R. R. Co.* (61 Hun, 66), reversed. *People* v. *N. Y., C. & St. L. R. R. Co.* 474

Kohler v. *Lindenmeyr* (58 Hun, 513), reversed. *Kohler* v. *Lindenmeyr*. 498

Stevenson v. *Stevenson* (34 Hun, 157), distinguished. *Romaine* v. *Chauncey*. 569

Francis v. *Schoellkopf* (53 N. Y. 152), distinguished and questioned. *Bohm* v. *M. E. R. Co.* 596

Plank v. *N. Y. C & H. R. R. R. Co.* (60 N. Y. 607), distinguished. *Finnell* v. *D., L. & W. R. Co.* 674

CAUSE OF ACTION.

A cause of action against a wrong-doer is a right of property, and can be taken from the owner only by process of law. *Dyett* v. *Hyman.* 351

CEMETERY ASSOCIATIONS.

1. The lands of a cemetery association, organized under the act of 1847 (Chap. 133, Laws of 1847), by virtue of the provision thereof (§ 10), which declares that the cemetery lands and property of any association formed under the act shall be exempt from taxation, are exempt from the moment they are acquired by the association, and continue exempt so long as the corporation exists, although no dead body is buried therein, and although by a valid ordinance, passed after its incorporation by a municipality within whose limits its lands lie, the burial of the dead therein is forbidden. *People ex rel.* v. *Pratt.* 68

2. Under the provisions of the charter of the city of Rochester (§ 40, chap. 14, Laws of 1880), giving to the common council power "to make, modify and repeal ordinances and by-laws to regulate the burial of the dead," that body has power to forbid by ordinance the burial of the dead in lands of a cemetery association within the city limits; and this, although at the time the association took the conveyance of its lands, it was lawful to use them for cemetery purposes. *Id.*

3. Such an ordinance is a police regulation which the legislature may authorize the common council to pass. *Id.*

4. The consent of said city is not essential to the incorporation of a cemetery association under said act, having for its objects the purchase of lands for the establishment of a cemetery within the city limits. *Id.*

5. Nor is the assent of the supervisors of the county of Monroe necessary. *Id.*

6. The various acts amendatory of said act of 1847 (Chap. 280, Laws of 1852; chap. 238, Laws of 1854; chap. 154, Laws of 1871, and chap. 389, Laws of 1889), which forbid the incorporation of such associations in certain counties named, without the assent of their respective boards of supervisors, apply only to the counties named. *Id.*

7. The exemption from taxation given by said act of 1847, is not affected by the amendment thereto of 1869 (Chap. 708, Laws of 1869). *Id.*

8. Nor is such exemption affected by the act of 1879, in relation to lands used for cemetery purposes (Chap. 310, Laws of 1879); that act relates to cemeteries other than those established under the act of 1847. *Id.*

9. Accordingly, *held*, where a cemetery association, incorporated under said act of 1847, had purchased lands for cemetery purposes with the limits of said city, and under the city ordinances then existing, the burial of the dead therein was permitted, but thereafter an ordinance was passed prohibiting such burial, that although the ordinance was valid and no burials could be made in said lands while it remained in force, an assessment of said lands for the purposes of taxation was illegal. *Id.*

10. *It seems*, in case the association fails to procure a repeal of the ordinance, it may apply for a voluntary dissolution, and upon dissolution dispose of its lands in the manner provided for in such case, or in case it shall refuse to make the application, the attorney-general may, after it has suspended its lawful business for a year, institute an action in behalf of the people for its dissolution. *Id.*

CERTIORARI.

1. The relator, a domestic corporation, organized under the General Manufacturing Act (Chap. 40, Laws of 1848), is engaged in the business of producing electricity and supplying the same to cus-

tomers for lighting purposes. In proceedings to review by certiorari a decision of the comptroller holding the relator liable to pay taxes and penalties imposed by the act of 1880, providing for the assessment and payment of taxes by certain corporations (Chap. 542, Laws of 1880), and the act of 1881 amending the same (Chap. 361, Laws of 1881), *held*, that it was a manufacturing corporation within the meaning of the provision of said act exempting such corporations, and so was exempt from taxation until the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause. *People ex rel.* v. *Wemple*. 543

2. The decision was made by the comptroller upon application of the relator, under the amendatory act of 1889 (Chap. 463, Laws of 1889), which authorizes the comptroller to revise and readjust any account for taxes settled by any corporation. The account against the relator was settled by the comptroller July 3, 1889, immediate notice of the assessment was given to it, and, after the expiration of thirty days, no proceedings having been taken to review the same, as provided by said act of 1881 (§ 17), as amended in 1885 (Chap. 501, Laws of 1885), the comptroller issued his warrant for the collection of the tax. It was claimed on behalf of the defendant that the relator had, by the delay, lost his right of review by certiorari. *Held*, untenable. *Id.*

3. The relator, up to the time the tax was so settled and adjusted in 1889, had made no reports and paid no taxes. It was claimed by defendant that the relator had another remedy, that is, by appeal from the determination of the comptroller to a board constituted for that purpose by the act of 1881 (§ 1), and so that under the provision of the Code of Civil Procedure (§ 2122), which provides that, except when otherwise prescribed by statute, a writ of certiorari may not be issued to review any determination which can be adequately reviewed upon appeal, to any body or officer. *Held*, untenable; that the said provision for appeal did not apply to a case where the corporation claiming it was not subject to any tax whatever, and had made no report, but simply to cases where reports having been made, the comptroller, not satisfied therewith, has proceeded to make a valuation of his own, and settled an account against the corporation on that valuation; that the valuation and determination in question was made, not under the section of said act containing said provision for appeal, but under a section (§ 12) added by the amendatory act of 1882 (Chap. 151, Laws of 1882), as amended in 1885 (Chap. 501, Laws of 1885); and so that, as by the act of 1889, under which the application was made (§ 20), express provision is made for review by certiorari of the action of the comptroller, the relator was entitled to the writ. *Id.*

CHAMPERTY.

It seems a violation of the statute against champerty can only be established by showing a possession under some specific title adverse to that of the grantor in the deed in question. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

CODE OF PROCEDURE.

§ 167. *Clason* v. *Baldwin*. 183

CODE OF CIVIL PROCEDURE.

§§ 449, 488, 498, 499. *Duncan* v. *C. M. Ins. Co.* 237
§ 484. *Clason* v. *Baldwin*. 183
§ 605. *People ex rel.* v. *Rice*. 461
§ 834. *Fisher* v. *Fisher*. 654
§ 843. *In re People ex rel.* v. *State Board of Canvassers*. 360
§ 970. *Lynch* v. *M. E. R. Co.* 274
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1496. 1497. 1503.	*Clason* v. *Baldwin.*	183
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2122.	*People ex rel.* v. *Wemple.*	543
2474. 2475. 2739.	*In re Ryder.*	640

COMMISSIONERS OF LAND OFFICE.

1. The power to convey lands under water of navigable waters conferred upon the commissioners of the land office (1 R. S. 208, § 67, as amended by chap. 283, Laws of 1850) only authorizes a conveyance to the owners of the adjoining upland; the right or privilege to apply for and receive the conveyance is appurtenant to the upland and vests in the owner thereof and can never exist severed from such ownership. *B. Mfg. Co.* v. *B. Sons Iron Works.* 155

2. The declaration in the act of 1850 (Chap. 283) that a grant of land under water made to any person other than the owner of the upland shall be void, is to be construed as subject to the settled rule that where evidence *de hors* the patent is requisite to establish its invalidity, it can be avoided only in a direct proceeding to review the action of the commissioners, or by action in equity to vacate the patent. *Id.*

COMMON CARRIERS.

While a common carrier of passengers, by his contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants when engaged in the performance of their duties, to warrant a recovery of damages alleged to have been caused by a breach of the undertaking, the negligence or willful misconduct must not only be shown, but it must also appear that the servant was acting at the time in the course of his employment. (EARL and FINCH, JJ., dissenting.) *Mulligan* v. *N. Y. & R. B. R. Co.* 506

See RAILROAD CORPORATIONS.

CONSIDERATION.

Where there was a good consideration for a draft when it was accepted, but subsequently such consideration entirely failed, *held*, that the failure of consideration was a good defense to any action upon the paper brought by one to whom it was transferred as security for an antecedent debt. *Leslie* v. *Bassett.* 523

CONSTITUTION.

1. *It seems*, the word "dues" in the provision of the State Constitution (§ 2, art. 8) providing that "dues from corporations shall be secured by such individual liability of the corporators * * * as may be prescribed by law" does not include "dues" to directors. *McDowall* v. *Sheehan.* 200

2. The provision of the State Constitution declaring that: "The trial by jury in all cases in which it has heretofore been used, shall remain inviolate forever" (§ 2, art. 1), does not apply to the trial of issues of fact in an equity action; and this, although as incidental to the equitable relief sought, a money judgment is asked for and issues of fact are presented which might be the basis of an action at law. *Lynch* v. *Met. E. R. Co.* 274

3. In construing a provision of the Constitution, its history and the conditions and circumstances attending its adoption must be kept in view, and the effect of subsequent amendments are to be determined by the same rules applicable to the interpretation of statutes. *Sweet* v. *City of Syracuse.* 316

4. The right to vote, secured to the citizen by the Constitution, must be exercised in the manner and subject to the regulations, as to time and method, lawfully prescribed

by the legislature. *People ex rel. Nichols* v. *Bd. County Canvassers.* 395

CONSTITUTIONAL LAW.

1. The legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets for the convenience of business, which, without such authority and under the common law, would be held to be encroachments and obstructions. *Hoey* v. *Gilroy.* 132

2. This power it may delegate to the governing body in a municipal corporation. *Id.*

3. While the legislature may fix the aggregate amount of a local tax and the area of assessment upon which it shall be imposed, as in so doing it determines a public question upon considerations of public interest and welfare, it cannot provide for the apportionment of the tax among the persons assessed, without also providing for notice or a hearing on the part of the taxpayer, as thereby a personal liability and a lien upon his property are initiated in relation to which he has a right to be heard. *In re Trustees Union College.* 308

4. The legislature cannot validate an act, invalid because it provides for the apportionment of such a tax without notice, by simply re-enacting the act. *Id.*

5. Accordingly *held*, that the provisions of the charter of Long Island City, in reference to its water supply (Tit. 10, chap. 461, Laws of 1871), which provide for the apportionment and assessment of water-rates upon lots, without giving to the owners or occupants an opportunity for a hearing, were unconstitutional, and that assessments made under it were void. *Id.*

6. Also *held*, that assessments made under said charter were not validated by the acts of 1882 (Chap. 383, Laws of 1882), or of 1886 (Chap. 656, Laws of 1886). *Id.*

7. Every presumption is in favor of the constitutionality of a statute, and to justify the court in pronouncing it an unauthorized expression of the legislative will, it must be made to appear that, when fairly and reasonably construed, it is in clear and substantial conflict with some provision of the Constitution. If the act and the Constitution can reasonably be so construed as to enable both to stand, it is the duty of the court to give them that construction. *Sweet* v. *City of Syracuse.* 316

8. That portion of the provision of the State Constitution, limiting the power of municipalities to create debts (Art. 8, § 11), which declares that the term of bonds issued by certain cities to provide for a water supply, "shall not exceed twenty years," and requires that "a sinking fund shall be created on the issuing of the said bonds, for their redemption," applies only to cities with a population exceeding 100,000. *Id.*

9. *It seems*, the only restriction imposed by said provision upon the power of the legislature to authorize cities not containing a population exceeding 100,000 to incur indebtedness is that none shall be incurred, except for city purposes. *Id.*

10. Accordingly *held*, that the provision of the act "to establish and maintain a water department in the city of Syracuse" (§ 18, chap. 291, Laws of 1889, as amended by chap. 314, Laws of 1890), which authorizes the issuing of city bonds, payable July 1, 1920, to defray the expenses of the work, and which makes no provision for a sinking fund, was not violative of said constitutional provision; it appearing that the city contained less than the specified number of inhabitants. *Id.*

11. Also *held*, that said act does not offend against the constitutional provision (Art. 3, § 16), providing that no local or private bill shall embrace more than one subject and requiring that to be expressed in the title; that under the title given, the legislature could properly insert not only every provision necessary for the organization of a

water department, but also provisons conferring power upon that body to supply the city with water. *Id.*

12. Also *held* that the provision of said act (§ 18), authorizing the city to take water from Skaneateles lake, is not repugnant to the constitutional provision (Art. 7, § 6) which prohibits the legislature from selling, leasing or otherwise disposing of the Erie and certain other canals; it appearing that, while the lake had been appropriated by the state "for a reservoir and feeder to the Erie canal," the water accumulated therein was in excess of that needed for canal purposes; that large quantities were permitted to flow from the lake which were not utilized by the state, much more than is authorized by the act to be taken from the lake for city purposes, and that the act only authorizes the taking of water not required for the use of the canal; that the provision did not sell or authorize the sale, nor did it lease the waters of the lake, but operated merely as a license to the city to take water not needed by the state, subject to the paramount right of the state to resume it at any time. *Id.*

13. Also *held*, that, conceding that said provision, as contained in the original act of 1889, was invalid, it did not render the whole act void; and that after the provision was amended in 1890, and thus rendered valid, nothing stood in the way of the full operation of the entire act. *Id.*

14. Also *held*, that even if the whole act was rendered invalid by the invalidity of said provision, after the amendment had cured the defect and validated the provision, the act was to be construed as if the amendment had been a part of it originally, and so, as containing no provision obnoxious to the constitutional objection. *Id.*

15. *It seems* that the meaning of the last-named constitutional provision is that neither the canals, as highways of commerce, nor other property owned by the state, connected with the canals and actually essential to their operation and maintenance, shall be sold or leased. *Id.*

16. The selling or leasing to, and the use by riparian owners or cities, of so much of the waters of streams and lakes appropriated as feeders and reservoirs for the canals as is not needed for the use of canals, subject to the paramount rights of the state, is not inconsistent with the public use, and an act authorizing it is not in conflict with said provision. *Id.*

17. So, also, the legislature may authorize the sale of state property once appropriated and used for the canals, but no longer required for canal purposes. *Id.*

18. In an action to restrain said city, its officials and the water board created by said act, from carrying into effect or exercising the powers conferred by it, it was conceded that neither the original act nor the act amending the same, received the vote of two-thirds of the members elected to each house, and it was claimed that the provision of the act above referred to (§ 18) was violative of the provision of the Constitution (Art. 1, § 9), declaring that the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating public moneys or property for local or private purposes. *Held*, untenable; that the state never acquired the ownership of the mass of water in the lake, but simply the right to the use of so much as is necessary for canal purposes; and that the condition of the grant to the city in the act was such that no property right or interest which the state owned was transferred, lost or impaired. *Id.*

19. Also *held*, that the word "appropriating," as used in said last-named constitutional provision, refers to a transfer of public property as a gift or gratuity, not to a transfer, for an equivalent; and that by the arrangement contemplated by the act, the state received an equivalent for the right granted. *Id.*

20. While it is competent for the legislature, in an act providing for the consolidation of domestic corporations, to declare what shall be the status of the corporations availing themselves of its provisions, and also of the consolidated companies, it has no power to authorize the consolidation of domestic corporations with those of another state, without the consent of the legislature of that state, in such manner as to vest, in case of such a consolidation, the franchises, rights and property of the foreign corporation in the consolidated company, or to authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, or to confer any exclusive authority for their consolidation. *People* v. *N. Y., C. & St. L. R. R. Co.* 474

CONTRACT.

1. B., plaintiff's husband, and one W., entered into a contract with defendant for the purchase of a farm by them of him for $5,092.52, "and other stipulations and payments heretofore made and to be performed;" these were not set forth. Indorsed upon the contract, however, was an agreement by the vendees to pay defendant in addition to said sum, $2,000, and interest, "secured in part" by a deed from B. and wife of certain lots belonging to her, said $2,000 to be paid to McL. prior to the execution of a deed by him to his vendees, and on a sale by McL. of the lots conveyed, the avails, after paying expenses, were to be applied on said $2,000. McL. subsequently conveyed the farm to the wife of W. for a new consideration agreed upon between them, and without the knowledge or consent of B. or his wife. In an action to compel defendant to reconvey said lots to plaintiff, and to pay her the rents received, *held*, that the deed from B. and wife was given as collateral security, and so, was in effect a mortgage, and as it appeared that the debt it was given to secure no longer existed, plaintiff, in the absence of other proof, was entitled to the relief sought. *Blazy* v. *McLean.* 44

2. In an action upon a contract, by which defendant agreed to pay half the expense of building a party-wall, it appeared that plaintiff built flues in the wall which encroached upon defendant's half. Plaintiff's counsel called as a witness an architect and asked him if it was customary to build flues in party-walls. This was objected to; said counsel stated that he desired to show it was a proper thing to put a flue in a party-wall. The court sustained the objection. *Held*, error. *Hammann* v. *Jordan.* 61

3. It was proved that to correct the defect caused by the flues and to give defendant substantially a similar use of the wall as that enjoyed by plaintiff, would cost from $128 to $130. *Held*, that the question as to whether there was such a substantial failure to comply with the agreement as would not authorize a deduction of the cost of curing the defect and grant judgment for the balance, was one of fact for the jury. *Id.*

4. To prove that the encroachment of the flues on defendant's land was not willful, plaintiff, as a witness in his own behalf, was asked whether he intended to have the wall built correctly with regard to the flues. This was objected to and excluded. *Held*, error; that it was competent for plaintiff to show that he did not encroach intentionally upon defendant's premises. *Id.*

5. Defendant claimed and some of his witnesses testified that the wall was not capable of a substantially similar use by him as by plaintiff, and one of them swore that there should have been a four-inch partition line between the flues in order to give defendant the same opportunity of using the wall as plaintiff. There was proof that defendant could obtain such opportunity by expending a certain amount for a chimney breast. A motion for a nonsuit was granted. *Held*, error; that assuming it to be a condition precedent to a recovery that an opportunity for a substantially similar use should exist, the questions as to what would amount

to a substantially similar use and whether, after deducting the expense incurred by defendant for a chimney breast, plaintiff should have judgment for the balance of his claim were questions of fact for the jury. *Id.*

6. Also *held*, that if defendant suffered any further damage by reason of plaintiff's encroachment, in the way of being compelled to use some portion of his lot for an additional wall, the amount of such damage would be for the jury to determine, and they should, if the amount is not so great as to show a substantial departure from the contract, deduct the same from the recovery otherwise allowable. *Id.*

7. *It seems* if the amount of damages is of so substantial a nature as to cause the jury to conclude that the encroachment itself, whether innocent or willful, was a substantial departure from the contract, the verdict should be for the defendant. *Id.*

8. It appeared that plaintiff in building the wall left openings for windows. Plaintiff proved that defendant saw these openings when the wall was being built and consented thereto. *Held*, that defendant could not thereafter change his mind and claim that the insertion of the windows was a violation of the agreement. *Id.*

9. P., a merchant doing business in New York, and St. A., a merchant in France, entered into a contract which, after reciting that D., the owner and packer of a certain brand of sardines was willing to give them the monopoly thereof, stated the agreement of the parties to be that they were to advance eighty per cent of cost of each invoice as forwarded from the factories; each to advance one-half; the sardines to be shipped to P. and sold, and the net profits to be divided equally between the parties and D. In pursuance of the contract, sardines were shipped to P., who borrowed of plaintiffs, a firm of bankers, the forty per cent agreed to be advanced by him. P. failed and made an assignment for the benefit of creditors. D. assigned his interest to St. A. Various creditors of P. brought actions against him, and upon attachments issued therein the sardines so sent were levied upon, as were also accounts for sardines sold. In an action to enforce an alleged banker's lien for the advances so made to P., a receiver was appointed, to whom was paid the proceeds of collection of accounts and of sales of the goods. *Held*, that the contract did not import to be a sale, but a joint enterprise; that St. A. had in equity a title to the goods or their proceeds superior to that of the individual creditors of P., and that this equity attached to the funds in the receiver's hands. *Drexel* v. *Pease*. 96

10. Defendants held certain claims which were doubtful and complicated, and not having the means to defray the expenses of litigations to collect them, they entered into an agreement with plaintiffs, a firm of lawyers, by which the latter were to undertake the collection, they to "receive upon settlement or recovery" a specified percentage of "such recovery or settlement in kind." All money or property received to be divided between the parties in the proportions specified; defendants reserving the right to substitute a cash compensation for a compensation in kind. A settlement proposed by plaintiffs not being approved of by defendants, they requested defendants to substitute another attorney, stating, however, if a settlement was made upon substantially the same terms as those rejected, they would be entitled to the agreed compensation. A substitution was made as requested. Defendants thereafter effected a settlement of the claims. In an action to compel the performance of the agreement by the delivery to plaintiffs of the specified proportion of the property received on the settlement, *held*, that the agreement amounted to an equitable assignment; but that, having failed to render the services, the agreement to perform which was the consideration for and, in effect, a condition of the assignment, their equitable right was thereby

efeated; that their withdrawal amounted to an abandonment of the contract and a forfeiture of all rights under it. *Holmes* v. *Evans*. 140

11. S. entered into a contract with K. whereby the former agreed to secure the title to a certain piece of land, subject to a purchase-money mortgage, procure a builder's loan, and erect two houses at her own expense thereon; K. to furnish one-half of all moneys in excess of said loan required to finish the houses. S. agreed when these were completed to convey one of them to K., by warranty deed, subject to the lien of one-half of said mortgages, or, in case the parties should elect to sell, upon a sale of both, to pay K. one-half of the net proceeds. The contract stated it to be the intent of the parties to equally divide any profits which might be realized by the sale of said buildings. S. executed to K. a mortgage on the premises to secure performance of the contract on her part. No sale of the property was made. In an action by one employed by S. to recover for work on the buildings, in which it was sought to hold K. responsible as a partner, *held*, that no partnership existed under the contract, as all it contains in relation to a sale or a division of profits is conditional upon the further agreement of the parties; that the transaction might be considered as a purchase by K. of a house under an executory contract of sale. *Demarest* v. *Koch*. 218

12. The equity resulting from a valid agreement by the owner of land, restricting the use thereof, although not a covenant running with the land or a legal exception or reservation out of it, but simply a personal contract, goes with the land into the hands of a purchaser from such owner, with notice, who did not buy innocently or in good faith, and this equity may be enforced by injunction. *Lewis* v. *Gollner*. 227

13. To warrant equitable relief in case of the infraction of such an agreement it is not essential that it should be binding at law, or that any privity of estate should exist between the parties, nor is it an objection that the contract is by parol. *Id.*

14. Defendant G., who was a builder of flats and tenement-houses, entered into a contract to purchase a lot fronting on a street in the rear of plaintiff's residence for the purpose of erecting thereon a flat or tenement-house. This street was then occupied by private residences of a superior character, and the contemplated structure would be an injury and damage to the neighboring premises. The price G. had agreed to pay was the full value of the premises; he had paid thereon but $500. Failing to induce G. to refrain from erecting such a building, certain owners in the neighborhood, including plaintiff, for the sole and declared purpose of saving the neighborhood from flats, purchased and took an assignment of the contract at an advance of $6,000, upon the oral agreement by defendant "that he would not construct any flats in plaintiff's immediate neighborhood or trouble him any more." G., however, soon thereafter purchased other premises in the neighborhood and commenced erecting a large flat thereon, and upon being threatened with an action he conveyed the premises to the other defendant, his wife, nominally in exchange for other property of comparatively small value, and then as her agent and architect continued the construction. The wife took title, with full knowledge of all the facts and for the purpose and with the intent of aiding and protecting her husband in his effort to avoid his contract. *Held*, that plaintiff was entitled to an injunction restraining the proposed erection, or the use of any structure on the premises as a flat. *Id.*

15. Equity will only enforce a parol contract for an interest in land when the contract is definite and certain in all its parts. *Crosdale* v. *Lanigan*. 604

16. Defendant sold plaintiff the plant of a zinc etching company with the appliances and good will of the

business, etc.; he agreed not to carry on, and not to be employed by or enter into partnership with any person or persons carrying on the same business for five years. Defendant did not thereafter carry on the particular business sold to plaintiff; but in his business, which was electrotyping and stereotyping, he used zinc etchings, and usually employed plaintiff to make them, but in a few instances he procured them from other persons. In an action to recover damages for an alleged breach of the contract, *held*, that no violation of it in letter or in spirit was shown. *Breck* v. *Ringler*. 656

See INSURANCE (LIFE).
INSURANCE (MARINE).
LEASE.

CONVERSION.

It seems the rule that where, in an action for an unlawful taking of goods, it appears that the original taking was wrongful, defendant is entitled to prove, in mitigation of damages, that the property was afterwards seized upon valid process against the owner, only applies where the general property in the goods was in the debtor and the application of the proceeds was made for his benefit; it does not apply in an action brought by his assignee, to whom he had transferred the property prior to the original taking. *Dyett* v. *Hyman*. 351

CORPORATIONS.

1. In an action by a stockholder of a gas light company, to prevent its consolidation with an electric light, heat and power company, the complaint alleged that the proposed consolidation, if carried out, would be ruinous to the stockholders of plaintiff's company; that the two corporations are not so similar as to come within the act authorizing the consolidation of manufacturing corporations (Chap. 367, Laws of 1884); that that act is permissive merely and does not exclude the interference of the court to prevent a wrong and injustice and is, in some of its features, unconstitutional. No answer was interposed and upon the complaint and affidavits of plaintiff and defendant's treasurer and president, and after hearing both parties an injunction *pendente lite* was granted restraining the consolidation. *Held*, an order of General Term affirming the order of the Special Term was not reviewable here. *Young* v. *R. & K. G. L. Co.* 57

2. *It seems*, the word "dues" in the provision of the State Constitution (§ 2, art. 8) providing that "dues from corporations shall be secured by such individual liability of the corporators * * * as may be prescribed by law" does not include "dues" to directors. *McDowall* v. *Sheehan*. 200

3. While the court has power, in proceedings for the voluntary dissolution of a corporation, to decree a distribution of its funds among those entitled thereto, it may not take from a trustee funds placed in his hands by the corporation for a specific purpose, pursuant to a contract obligation, and itself distribute them through its receiver instead of through the trustee; the latter is, notwithstanding the dissolution, entitled to the possession of the trust fund, and the authority of the court is limited to compelling the trustee to distribute the fund, as provided for by the contract, and under the supervision and orders of the court. *In re H. P. S. F. Assn.* 288

4. Where, therefore, a life insurance association, which proposed to issue certificates of membership to those becoming members, with a statement in each certificate that certain sums received thereon should be paid over to a trust company, as a safety fund for the security of the members, to be paid out by the trustee in the manner specified, entered into a contract with the trust company, by which the latter agreed to receive and hold this fund and pay it out in the manner and for the purposes so specified, *held*, that the court had no power, on a voluntary dissolution of the corporation, to order said trustee

to pay over the trust fund, deposited in pursuance of the agreement, to the receiver appointed in said proceedings. *Id.*

5. Also *held*, that the question was not affected by the fact that the agreement stated that the fund belonged to the association, subject to the execution of the trust. *Id.*

6. Upon application of the relator, a domestic corporation, to the state comptroller for a revision and readjustment of the account of taxes settled against it pursuant to the act providing for taxing certain corporations (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881; chap. 151, Laws of 1882, and chaps. 359 and 501, Laws of 1885), it appeared by the relator's certificate of incorporation that it was incorporated for the purpose of carrying on some part of its business out of the state, but that its operations were to be conducted and carried on and its principal place of business was to be in the state. During three years, for which taxes were imposed, it was engaged in business out of the state, but it had its office in the state and kept its bank accounts here. It made annual reports to the comptroller, by which it appeared that dividends were declared and paid upon its capital during those years, and the comptroller based his adjustment of the account of taxes upon the amount of capital employed in this state, which he determined from the average monthly balances in the New York banks, and the expenditures for the maintenance of its office here. *Held*, that there was sufficient evidence upon which the comptroller could act in finding a basis for assessment, and that the tax was properly imposed. *People ex rel.* v. *Wemple.* 558

7. The qualifying words, "and doing business in this state," in the provision of said act (§ 3), subjecting to the tax prescribed, every corporation not excepted from its operation, which is "incorporated or organized by or under any law of this state, or * * * under the laws of any other state or country, *and doing business in this state*," have reference only to foreign corporations. As to corporations organized under the laws of this state, the legislative power to tax their business and franchises is general; but as to foreign corporations, the jurisdiction is gained from the business which they do in this state, and the tax is upon that business. *Id.*

8. The tax imposed by said act is not upon the property of the corporations, but upon their franchises and business; and as to domestic corporations, is in no sense restricted to such as do business in this state. *Id.*

9. Where a corporation is subject to taxation under said act, the determination of the comptroller as to the assessment and taxation, unless clearly shown to be erroneous, will not be disturbed. *Id.*

——*As to power of comptroller to tax manufacturing corporations and electric light companies.*

See People ex rel. v. *Wemple.* 543
People ex rel. v. *Wemple.* 558
People ex rel. v. *Wemple.* 664

See CEMETERY ASSOCIATIONS.
ELECTRIC LIGHT COMPANIES.
INSURANCE (LIFE).
INSURANCE (MARINE).
MANUFACTURING CORPORATIONS.
MUNICIPAL CORPORATIONS.
MUTUAL BENEFIT ASSOCIATIONS.
RAILROAD CORPORATIONS.

COUNTY CLERK.

The duty of a county clerk, when acting under the authority of the statute (§§ 3, 9, art. 1, tit. 5, chap. 130, Laws of 1842), as secretary of the board of county canvassers is purely ministerial; he has no authority to sit in judgment upon the action of that body, and may not refuse to certify as correct, and attest by his signature, a statement made by the board of the result of an election, because, in his opinion, it does not give the correct legal result. If the statement, as made, correctly sets forth the action of the board, it is his duty to certify and sign it, without regard to the question as to whether

the board has done its duty in a valid way or not. *In re People ex rel.* v. *Rice.* 449

COUNTY JUDGE.

1. The provision of the charter of the city of Albany of 1883 (§ 2, title XI, chap. 298, Laws of 1883), providing that if, in the proceedings relative to an assessment for a local improvement in said city of Albany, "any fraud or defect in the work, or substantial error, shall be alleged to exist or have been committed, the party aggrieved thereby may apply to have the assessment vacated or reduced," and giving the county judge jurisdiction to entertain the application, applies only to assessments thereafter made. *In re D. & H. C. Co.* 105

2. Accordingly *held*, that the county judge had no jurisdiction to entertain an application to vacate an assessment made, completed and confirmed prior to the enactment of said charter. *Id.*

COURTS.

See COURT OF APPEALS.
SUPREME COURT.
SURROGATE'S COURT.

COURT OF APPEALS.

To justify this court in dissolving a temporary injunction, where the inevitable result will be the defeating of plaintiff's remedy without a trial, it must be satisfied that the case is one, in which, by settled adjudication, the plaintiff, upon the facts stated, is not entitled to final relief. *Young* v. *R. & K. G. L. Co.* 57

——*When the amount of allowances to which a trustee is entitled for costs and expenses incurred by him in securing or preserving the trust fund has been determined by the Supreme Court on conflicting evidence, this court has no power to review the determination.*

See Woodruff v. *N. Y., L. E. & W. R. R. Co.* 27

COVENANTS.

1. A covenant of warranty and of quiet enjoyment or against incumbrances in a deed is not broken by a mere trespass, not amounting to an eviction, committed without claim of right on the part of the trespasser. *Horton* v. *Bauer.* 148

2. A grantee suing for breach of covenant in a full covenant deed does not conclusively establish his cause of action by showing an apparent cloud upon the title, or by proof of such circumstances as would justify a court of equity in refusing to compel a specific performance by a purchaser under an executory contract to take a deed. The action concerns real not simply apparent defects and it is well defended by proof satisfactory to the court that the title is not in fact defective. *Wilson* v. *Parshall.* 223

CREDITOR'S SUIT.

A general creditor having no judgment cannot maintain an action to set aside a conveyance by his debtor in fraud of the rights of creditors. *Briggs* v. *Austin.* 208

DAMAGES.

1. Prior to the construction of defendants' elevated railroad in a street in the city of New York, premises abutting on said street, then a vacant lot, were leased to one S. for a term of years, the lessor covenanting that, if during said term the lessee erected upon said lot a building of a character described, she would at the expiration of the term pay the value of the same or grant a renewal for another term. The lessee built upon said premises and thereafter assigned the lease to plaintiff, who took possession and has since then been in possession. After the construction of defendants' road and upon the expiration of the term, the lessor, in accordance with the covenants of the lease, executed to plaintiff a new lease which contained similar provisions as to renewal and the purchase of the

building on the premises. In an action to restrain the operation of said road and for damages, the court granted the injunction, unless defendant paid a sum fixed as the value of the easements appropriated or interfered with, and awarded damages for injuries to the property during the six years preceding the commencement of this action. *Held*, no error; that plaintiff's title and right of possession date from the assignment of the lease to him; that the new lease must be regarded as simply a continuation of the prior one; that plaintiff for the purposes of the case was to be construed as the owner of the building and was entitled to recover such sum as represented its diminished rental value caused by the construction and operation of the road. *Kearney* v. *Met. E. R. Co.* 76

2. Also *held*, that plaintiff was entitled to damages for the period during which the premises were leased by him to sub-tenants. *Id.*

3. The distinction pointed out between this case and that of a tenant holding under a lease executed after the construction of the road. *Id.*

4. While under the Code of Procedure (§ 167) only damage for withholding possession were incidental to a recovery by plaintiff in an action of ejectment, and a claim for rents and profits or for value of the use and occupation was a separate and distinct claim and so required to be separately pleaded, under and by the Code of Civil Procedure (§§ 484, 1496, 1497), this requirement is dispensed with and the incidental damages plaintiff is entitled to recover under his general demand includes the rents and profits or value of the use and occupation from the time of the commencement of the action. *Clason* v. *Baldwin.* 183

5. Where, therefore, in such an action the landlord was made sole defendant and answered, denying simply the allegations in the complaint of title and right to immediate possession and that such possession was wrongfully withheld by defendant, *held*, that it was not error to confine defendant upon the trial to the questions so presented; that they having been determined upon sufficient evidence in plaintiff's favor, a judgment was proper awarding him possession; and that under the general demand for damages plaintiff was properly allowed to prove and to recover the annual rental of the premises from the date of the commencement of the action to the time of the trial. *Id.*

6. *It seems*, however, a recovery of these items, as part of the damages included in the general demand, for a term prior to the commencement of the action, would not be proper. *Id.*

7. Where a public use authorized by law takes no land of an individual, but merely affects him by his proximity, the necessary annoyances of that use furnish no basis for damages. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

8. In awarding an injunction against an elevated railroad company, restraining it from operating its road in a street in front of plaintiff's premises, the court fixed as an alternative the payment of a sum specified for the permanent or fee damage; of that amount $1,000 was specifically awarded as damages resulting from the noise caused by the operation of the road. *Held*, error; that the noise could not properly be taken into consideration as an element of fee damage. *Id.*

9. The allowance of alternative damages in such a case is to be deemed a substitute for the ordinary proceedings for condemnation; and so, the amount of the allowance is not wholly in the discretion of the court, but must be for such and only such damages as would be given in condemnation proceedings. *Id.*

10. As the elevated roads in said city stand wholly upon lands owned by the municipality, they are liable to abutting owners only for such consequential damages

as result from the invasion of property rights; that is, the taking of their easements in the streets — these are, the easement of air, which is impaired by smoke and gases, ashes and cinders; the easement of light, impaired by the structure itself, and the passage of cars thereon; the easement of access, affected by the drippings of oil and water and by the frequent columns. *Id.*

11. *It seems* the rule that where, in an action for an unlawful taking of goods, it appears that the original taking was wrongful, defendant is entitled to prove, in mitigation of damages, that the property was afterwards seized upon valid process against the owner, only applies where the general property in the goods was in the debtor and the application of the proceeds was made for his benefit; it does not apply in an action brought by his assignee, to whom he had transferred the property prior to the original taking. *Dyett* v. *Hyman.* 351

12. An elevated railroad in a city street, erected and operated without the consent of the owners of property abutting upon the street, or without having acquired their rights therein, being illegal, such an owner is entitled to recover all damages of every kind caused to him while such road is so illegally maintained and operated. *Messenger* v. *Manhattan R. Co.* 502

13. Where, however, in an action by an abutting owner to restrain the operation of the road, the defendant is permitted to pay the damage to the fee, in estimating those damages the evidence must be confined to what the railroad company is authorized to take or interfere with, to wit, the easements of light, air and access. *Id.*

14. Where, in an action to restrain the operation of an elevated railroad in a city street in front of plaintiff's premises, the defendant is allowed to pay the permanent or fee damages in lieu of an injunction, the damages to be allowed are such and only such as would be given in a proceeding for condemnation of lands for railroad purposes. *Bohm* v. *Met. E. R. Co.* 576

15. The rule of damages in condemnation proceedings is the full value of the land taken, at the market price, with no deductions for any purpose whatever; and as to the land remaining, if it appears that its value will be depreciated by the proposed use, this depreciation may be awarded as part of the consequential damages suffered. *Id.*

16. An abutting owner, by reason of his situation, has certain rights and privileges in a city street termed easements, which are appurtenant to his land, and are a species of property. The beneficial enjoyment of these easements is interfered with by the erection and operation of an elevated railroad in the street. This interference is a taking of them *pro tanto*, and entitles the owner to payment therefor, and in addition the damage done his adjoining land. *Id.*

17. As, however, these easements are of no value in and of themselves separated from the land, the real and only damage, if any, suffered by the owner in any particular case is a consequential one, *i. e.*, the effect produced upon his abutting land. *Id.*

18. The question is simply as to the actual result upon the land remaining, *i. e.*, has the actual market value been decreased by the taking, or has it prevented an enhancement in value greater than has actually occurred; and if so, to what extent? The damage defendant may be required to pay is the difference between the actual market value of plaintiff's land and what it would have been worth if the railroad had not taken the other property, *i. e.*, the easements. *Id.*

19. Where, therefore, it appears that there has been neither a decrease in value nor any prevention of an increase caused by the railroad, plaintiff is entitled only to nominal damages. *Id.*

20. So, also, *it seems*, where it appears that the plaintiff's abutting land has actually increased in value, unless it is shown that but for the acts of the defendants in taking the easements, it would have grown still more in value, no damage is proved. *Id.*

21. It is not essential to show that plaintiff has received benefits from the taking special and peculiar to his land, not shared in generally by other abutting owners. *Id.*

22. Accordingly *held*, as it appeared by the uncontradicted evidence that there was an increase in value of all the lands abutting on the street, including plaintiff's, since the construction of defendants' road, and that the road largely caused the increase, an allowance of substantial damages was error. *Id.*

23. Also *held*, the fact that other property in the vicinity of plaintiff's and in the side streets had been more than proportionally increased in value by reason of defendants' road, was not material. *Id.*

DEBTOR AND CREDITOR.

See ASSIGNMENT (FOR BENEFIT OF CREDITORS).
BANKRUPTCY.
CREDITOR'S SUIT.

DECEIT.

1. *It seems*, that an imitation of the names, signs or marks under which another conducts a business is a deception practiced upon the public and an injury to the proprietor in the loss of custom and patronage, to redress which the jurisdiction of a court of equity may be invoked. *Munro* v. *Tousey*. 38

2. This rule applies to the publication of books under a particular name; this is the subject of property, and a colorable imitation of the name adopted by one publisher by another engaged in publishing similar books, by which the public may be easily misled into supposing it is the literary article they desired to obtain and read, is an act of deception which injures the publisher who first adopted the name, and which he may call upon a court of equity to redress. *Id.*

3. A covenant of warranty and of quiet enjoyment or against incumbrances in a deed is not broken by a mere trespass, not amounting to an eviction, committed without claim of right on the part of the trespasser. *Horton* v. *Bauer*. 148

DEED.

1. Where the owner of upland on the Hudson river conveyed the same by deed containing an exception of all the water rights and privileges in the river appertaining to the premises, *held*, that the exception was wholly ineffectual as such, or as precluding a subsequent owner of the upland from claiming title to the land under water under a patent from the state issued to it as such owner. *B. Mfg. Co.* v. *B. Sons Iron Works*. 155

2. A party who alleges that a deed of real estate, absolute in form, is a mortgage, must show it by very satisfactory evidence. *Wilson* v. *Parshall*. 223

3. A grantee suing for breach of covenant in a full covenant deed does not conclusively establish his cause of action by showing an apparent cloud upon the title, or by proof of such circumstances as would justify a court of equity in refusing to compel a specific performance by a purchaser under an executory contract to take a deed. The action concerns real not simply apparent defects, and it is well defended by proof satisfactory to the court that the title is not in fact defective. *Id.*

4. In such an action, plaintiff claimed that the deed under which defendant, his grantor, claimed title was in fact a mortgage. The evidence on the part of the plaintiff was to the effect that said deed was executed to pay an indebtedness

to a firm of which defendant was a member; that the debt was not to survive the deed, but the firm was to sell the land and after paying the liens thereon, including the debt, to pay over the balance to the grantor. *Held*, that a verdict was properly directed for defendant; that defendant took an absolute title under his deed, his grantor retaining no title or interest in the land as such, but simply an interest in the proceeds to be realized on a sale. *Id.*

5. Where the owners of a block of land in a city laid it out into lots, and sold and conveyed a corner lot, subject to a right of way, fifteen feet in width across the rear thereof from the side street, "for horses, carriages and carts for the private convenience of the owners" of other lots, the way "to be kept open * * * for the uses and purposes aforesaid and no other," *held*, that the grantee and his successors in title were not restricted from building over the way, so long as they left it open the specified width, and to a height sufficient so as not to interfere with the passage of "horses, carriages and carts" through and along it; that they were not required to keep the way open for the purpose of furnishing light and air to buildings on the other lots. *Hollins* v. *Demorest.* 676

DEFENCES.

1. Negotable paper, transferred as security for or in nominal payment of interest to accrue upon an antecedent debt, is subject to all the equities existing between the original parties to it and to any defenses which would have been available to the maker had the paper not been transferred. *Leslie* v. *Bassett.* 523

2. Where, therefore, there was a good consideration for a draft when it was accepted, but subsequently such consideration entirely failed, *held*, that the failure of consideration was a good defense to any action upon the paper brought by the transferee. *Id.*

DEFINITIONS.

1. An indebtedness incurred by an agent because of his failure to pay over rents collected by him as agent, is not a debt created by defendant "while acting in a fiduciary capacity" within the meaning of the provision of the Bankrupt Act declaring that such a debt shall not be discharged by bankrupcy proceedings (U. S. R. S. § 5117), and so, it is barred by the discharge. *Mulock* v. *Byrnes.* 23

2. The term "party-wall" does not necessarily imply an absolutely solid structure, and there is no rule requiring a wall to be such a structure in order to be a party-wall. *Hammann* v. *Jordan.* 61

3. The firm of P. & L. held an open policy issued by plaintiff, consisting of a cargo policy and annexed thereto a freight policy. By the cargo policy the insurance was "on cargo, freight and advances." It contained a clause to the effect that "the freight and advances insured under this policy are subject to the terms and conditions of freight policy attached." *Held*, that the meaning of this clause was not that the freight policy should control alone as to insurance on advances, but that to the terms and conditions of the cargo policy was to be added such of those contained in the freight policy as were pertinent and might concern the risk insured. *Phœnix Ins. Co.* v. *Parsons.* 86

4. The word "creditors," as used in the provision of the General Manufacturing Act (§ 10, chap. 40, Laws of 1848), making the stockholders of a corporation organized under it liable to the creditors of the company until the whole amount of the capital stock has been paid in and a certificate thereof filed, does not include directors of the corporation, and a director to whom the corporation has become indebted cannot enforce the liability so imposed. *McDonall* v. *Sheehan.* 200

5. *It seems*, the word "dues" in the provision of the State Constitution (§ 2, art. 8) providing that "dues

from corporations shall be secured by such individual liability of the corporators * * * as may be prescribed by law" does not include "dues" to directors. *Id.*

6. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of the provision of the Code of Civil Procedure (§ 449) which authorizes the trustee of an express trust to sue in his own name without joining with him the party for whose benefit the action is prosecuted. *Duncan* v. *China Mut. Ins. Co.* 237

DEVISE.

The will of D., after a devise to his wife of a life estate in all his real estate, contained a devise of certain lands, commencing as follows: "At the death of my wife, I give and devise," etc. The devise was to a religious society, the land to be used as a parsonage; the devise providing that whenever the society ceased to so use it, it should revert to the testator's heirs. The society was unincorporated at the time of the testator's death, but was incorporated during the life of his widow. In an action for partition brought by one of the heirs of D., who claimed the devise to be void, *held*, that the terms of the will showed the intent of the testator to be to vest the estate in the devisee at the time of, and not before, the death of the wife, and if the devisee at that time should be able to take, the devise was valid, the title to the remainder being in the heirs from the time of the testator's death to that of his widow, subject to be divested if the devisee at the time of her death was an existing corporation capable of taking, in which event the title would vest in it. *Longhead* v. *D. Bap. Church.* 211

DISCONTINUANCE.

Where an action is brought against several alleged joint wrong-doers, the plaintiff may at any time, by leave of the court, discontinue the action as to one or more of the defendants. *Dyett* v. *Hyman.* 351

DIVORCE.

1. Alimony awarded to an innocent wife by a court of equity, as incidental to a decree of divorce in her favor, is simply an allowance for her support and maintenance; the awarding it is not an enforcement of a debt due to her from her husband, but of the marital obligation of support from which the husband, because of his misconduct, is not relieved by the decree; which obligation is made specific and is measured by the court. The allowance made becomes a debt only in the sense that the general duty over which he had a discretionary control has been changed into a specific duty. (Code Civ. Pro. § 1759.) *Romaine* v. *Chauncey.* 566

2. While, therefore, alimony is in one sense property of the wife, it is a specific fund provided for a specific purpose only, whose express limitations take it out of the general law of property, and as it is created by equity, it should have the protection of equity, so that it may not be perverted to a purpose for which it was not intended. *Id.*

3. Accordingly *held*, that the court would not lend its aid to compel the appropriation of alimony awarded to a wife in a decree of divorce to the payment of a debt contracted by her and actually subsisting prior to the date of the decree. *Id.*

4. *It seems* a court of equity, when applied to for its active assistance in the enforcement of a claim founded upon a bare legal right, will either refuse its aid where granting it will work injustice, or will impose conditions calculated to mitigate or remove the injustice. *Id.*

DRAFTS.

See BILLS, NOTES AND CHECKS.

EASEMENTS.

1. Prior to the construction of defendants' elevated railroad in a street in the city of New York,

premises abutting on said street, then a vacant lot, were leased to one S. for a term of years, the lessor covenanting that, if during said term the lessee erected upon said lot a building of a character described, she would at the expiration of the term pay the value of the same or grant a renewal for another term. The lessee built upon said premises and thereafter assigned the lease to plaintiff, who took possession and has since then been in possession. After the construction of defendants' road, and upon the expiration of the term, the lessor, in accordance with the covenants of the lease, executed to plaintiff a new lease, which contained similar provisions as to renewal and the purchase of the building on the premises. In an action to restrain the operation of said road and for damages, the court granted the injunction, unless defendant paid a sum fixed as the value of the easements appropriated or interfered with, and awarded damages for injuries to the property during the six years preceding the commencement of this action. *Held*, no error; that plaintiff's title and right of possession date from the assignment of the lease to him; that the new lease must be regarded as simply a continuation of the prior one; that plaintiff, for the purposes of the case, was to be construed as the owner of the building, and was entitled to recover such sum as represented its diminished rental value caused by the construction and operation of the road. *Kearney* v. *Met. E. R. Co.* 76

2. Also *held*, that plaintiff was entitled to damages for the period during which the premises were leased by him to sub-tenants. *Id.*

3. The easements which an abutting owner has in a city street, where title to the land is in the municipality, are the easement of air, which is impaired by smoke and gases, ashes and cinders; the easement of light, impaired by the structure itself, and the passage of cars thereon; the easement of access, affected by the drippings of oil and water and by the frequent columns. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

4. An elevated railroad in a city street, erected and operated without the consent of the owners of property abutting upon the street, or without having acquired their rights therein, being illegal, such an owner is entitled to recover all damages of every kind caused to him while such road is so illegally maintained and operated. *Messenger* v. *Manhattan R. Co.* 502

5. Where, however, in an action by an abutting owner to restrain the operation of the road, the defendant is permitted to pay the damage to the fee, in estimating those damages the evidence must be confined to what the railroad company is authorized to take or interfere with, to wit, the easements of light, air and access. *Id.*

6. An abutting owner, by reason of his situation, has certain rights and privileges in a city street termed easements, which are appurtenant to his land, and are a species of property. The beneficial enjoyment of these easements is interfered with by the erection and operation of an elevated railroad in the street. This interference is a taking of them *pro tanto*, and entitles the owner to payment therefor, and in addition the damage done his adjoining land. *Bohm* v. *Met. E. R. Co.* 576

7. As, however, these easements are of no value in and of themselves separated from the land, the real and only damage, if any, suffered by the owner in any particular case is a consequential one, *i. e.*, the effect produced upon his abutting land. *Id.*

8. The question is simply as to the actual result upon the land remaining; *i. e.*, has the actual market value been decreased by the taking, or has it prevented an enhancement in value greater than has actually occurred; and if so, to what extent? The damage defendant may be required to pay is the difference between the actual market value of plaintiff's land and what it would have been worth

if the railroad had not taken the other property, *i. e.*, the easements. *Id.*

9. Where, therefore, it appears that there has been neither a decrease in value nor any prevention of an increase caused by the railroad, plaintiff is entitled only to nominal damages. *Id.*

10. So, also, *it seems*, where it appears that the plaintiff's abutting land has actually increased in value, unless it is shown that but for the acts of the defendants in taking the easements, it would have grown still more in value, no damage is proved. *Id.*

11. Where the owners of a block of land in a city laid it out into lots, and sold and conveyed a corner lot, subject to a right of way, fifteen feet in width across the rear thereof from the side street, "for horses, carriages and carts for the private convenience of the owners" of other lots, the way "to be kept open * * * for the uses and purposes aforesaid and no other," *held*, that the grantee and his successors in title were not restricted from building over the way, so long as they left it open the specified width, and to a height sufficient so as not to interfere with the passage of "horses, carriages and carts" through and along it; that they were not required to keep the way open for the purpose of furnishing light and air to buildings on the other lots. *Hollins* v. *Demorest*. 676

EJECTMENT.

1. If the plaintiff in an action of ejectment fails to make a tenant in occupation of the premises a party, bringing the action against the landlord only, and the latter joins issue without pleading the non-joinder of the tenant, by his omission to so plead he waives the defect of the non-joinder and as he is a proper party (Code Civ. Pro. § 1503), the action must be tried upon the question of plaintiff's title and right to possession, although a recovery of the land cannot be enforced as against the tenant's occupancy. *Clason* v. *Baldwin*. 183

2. While, under the Code of Procedure (§ 167), only damage for withholding possession were incidental to a recovery by plaintiff in an action of ejectment, and a claim for rents and profits, or for value of the use and occupation, was a separate and distinct claim, and so required to be separately pleaded, under and by the Code of Civil Procedure (§§ 484, 1496, 1497), this requirement is dispensed with, and the incidental damages plaintiff is entitled to recover under his general demand includes the rents and profits or value of the use and occupation from the time of the commencement of the action. *Id.*

3. Where, therefore, in such an action the landlord was made sole defendant and answered, denying simply the allegations in the complaint of title and right to immediate possession, and that such possession was wrongfully withheld by defendant, *held*, that it was not error to confine defendant upon the trial to the questions so presented; that they having been determined upon sufficient evidence in plaintiff's favor, a judgment was proper awarding him possession; and that under the general demand for damages plaintiff was properly allowed to prove and to recover the annual rental of the premises from the date of the commencement of the action to the time of the trial. *Id.*

4. *It seems*, however, a recovery of these items, as part of the damages included in the general demand, for a term prior to the commencement of the action, would not be proper. *Id*

ELECTION (OF OFFICERS).

1. A writ of mandamus should not be granted upon the application of an individual to compel the issuing of a certificate of election to one who has no right under the Constitution to hold the office. *In re People ex rel. Sherwood* v. *State Bd. of Canvassers*. 360

2. A member of the board of park commissioners, appointed under and in pursuance of the act of 1891 (Chap. 308, Laws of 1891), providing for a public park in the city of Hornellsville, is an officer under the city government within the meaning of the provision of the State Constitution providing "that no person shall be eligible to the legislature who, at the time of his election is, or within one hundred days previous thereto has been, * * * an officer under any city government." (§ 8, art. 3.) *Id.*

3. Upon application for a mandamus to compel the board of state canvassers to issue a certificate of election as state senator to the relator, who concededly had received the greatest number of votes for that office, it appeared that he had been duly appointed as a member of said board of park commissioners; that he duly qualified and was acting as such commissioner at the time of his election. *Held* (ANDREWS and FINCH, JJ., dissenting), that the writ was improperly granted; that a denial of the relief sought was not an interference with the jurisdiction of the senate given by the provision of the Constitution making each house of the legislature the judge of the elections and qualifications of its members (§ 10, art. 3) as it no way affected the right of that body, when it convened, to determine as to whether the relator was entitled to the office; that the refusal of the writ was simply an exercise of the jurisdiction the relator had invoked by refusing to aid him in a proposed intrusion into the office. *Id.*

4. *It seems*, the board of state canvassers acts ministerially and has no jurisdiction to go outside of the returns of the county canvassers, or to institute an inquiry as to the eligibility of the candidates voted for by the electors; nor has it authority to determine whether a minority candidate was elected where it appears that the majority candidate was ineligible. *Id.*

5. *It seems*, also, that none of the officers charged with the duty of canvassing votes derives any power to pass upon the eligibility of candidates, or to disregard votes cast for an ineligible candidate, under the provisions of the Ballot Laws of 1890 (§ 21, chap. 262, Laws of 1890), providing that "whenever a candidate for any office whose name is printed on the official ballot, shall have died, shall be or become ineligible, or shall have withdrawn before election day, voters may use an unofficial ballot * * * and the name of the * * * candidate shall be considered as having been erased from the official ballot." That provision was intended merely to enable voters in the cases mentioned to vote unofficial ballots, and only in case some candidate has been voted for by an unofficial ballot is the name of the candidate on the official ballot to be considered as having been erased. *Id.*

6. *It seems* also, that the board of state canvassers derives no power to inquire as to the eligibility of the relator, from the provision of the Code of Civil Procedure (§ 843), declaring that "where an officer, person, board or committee, to whom or to which application is made to do an act in official capacity, requires information or proof to enable him or it to decide upon the propriety of doing the act, he or it may receive an affidavit for that purpose;" that as said board has no jurisdiction to inquire as to the relator's eligibility, it can have no official act to perform in reference thereto, and so, can require no information or proof to enable it to enter upon such inquiry. *Id.*

7. A board of county canvassers, in connection with their returns of the result of an election, sent to the secretary of state a copy of a resolution passed by the board, to the effect that a candidate for the office of state senator, who the returns showed had received a majority of the votes of the county for that office, was not eligible, as appeared by certain affidavits and papers which were also sent with the copy. Upon application of said candidate an order was granted directing the issuing of a writ of

mandamus requiring said secretary to return said papers to the board of county canvassers or the county clerk or to cancel the same of record and forbidding him from permitting them to be brought before the state board of canvassers for their consideration. *Held*, error; that while the state board had no right to consider said papers, no official duty required the secretary of state to return the papers and he violated no official duty in placing them before said board; that while the writ would do no harm, it could accomplish no useful purpose, and should have been denied. *In re People ex rel. Sherwood* v. *Rice*. 391

8. The right to vote, secured to the citizen by the Constitution, must be exercised in the manner and subject to the regulations, as to time and method, lawfully prescribed by the legislature. *People ex rel. Nichols* v. *Bd. Co. Canvassers*. 395

9. Where a statute, therefore, prescribes the method of voting, all of its substantial requirements must be complied with, and while *it seems*, in the absence of some clear and positive prohibition in the statute against counting ballots cast without observing the forms and regulations prescribed, the tendency of the courts is to effectuate the intent of the voter, and that the statute should be so construed as not to place an arbitrary or unreasonable obstruction in his way, where there is such a prohibition the ballots so cast are void and should not be counted. *Id.*

10. The primary object of the "Ballot Reform Act" (Chap. 262, Laws of 1890, amended by chap. 296, Laws of 1891) is to enable the voter to cast his ballot without the possibility of revealing by the act of voting the identity or political complexion of the candidates voted for. *Id.*

11. *It seems*, therefore, that any construction of the statute which will permit votes to be cast and counted which contain any caption or word revealing what is so sought to be kept secret, should be avoided. *Id.*

12. The said act requires the same indorsement upon all the official ballots used at any polling place, and any ballot cast having a different indorsement and one disclosing the candidates voted for is void and may not be counted (§ 17); and this, without regard to the question as to whether the change was made with intent to render the ballot distinguishable, or as to whether the elector had knowledge or means of knowledge of the improper indorsement. (ANDREWS, FINCH and PECKHAM, JJ., dissenting) *Id.*

13. The provisions of said act (§ 29) prohibiting inspectors of election from depositing any ballot, except the unofficial ballot, provided for (§ 21), not properly indorsed or one having "a distinguishing mark on the outside thereof," and the provision of said act (§ 31) prohibiting the canvasser from counting any such ballot refer to the official ballots, not to unofficial ballots other than those provided for in the act. (ANDREWS, FINCH and PECKHAM, JJ., dissenting.) *Id.*

14. In proceedings by mandamus to compel a county board of canvassers to reject certain votes cast at a general election for P., a candidate for the office of state senator, these facts appeared: The county clerk, in compliance with said act, caused official ballots to be printed for each election district in the county, one for each of the political parties that had made nominations; all were alike indorsed, as prescribed by the statute, with the designation of the polling place or election district for which the ballots were prepared. In transmitting these ballots to the town clerk, while those of all the parties, but the one of which P. was the candidate for senator, were properly delivered, in nine of the election districts the ballots of that party were transposed, so that those indorsed for one district were sent to another, and were there used and voted, and thus the ballots for that party in each of said districts were indorsed with the number or designation of another district and could be distinguished

from those of the other parties. *Held* (ANDREWS, FINCH and PECKHAM, JJ., dissenting), that an order granting the writ prayed for was proper; that the defective ballots could not be considered as unofficial ballots, as they purported to be official ballots and the condition authorizing the use of unofficial ballots did not exist; and that said ballots could not lawfully be counted. *Id.*

15. Any citizen may invoke the aid of the courts to compel the performance by a public officer of a public duty, and so an elector may, at least in the case of the death of the candidate interested, make application to the proper tribunal for a mandamus to compel the state board of canvassers to reject and disregard a paper purporting to be a return of a board of canvassers, but which is not properly signed and certified, and does not give the results of a proper legal canvass, and to consider only a proper return. *In re People ex rel. Daley* v. *Rice.* 449

16. The duty of a county clerk, when acting under the authority of the statute (§§ 3, 9, art. 1, tit. 5, chap. 130, Laws of 1842), as secretary of the board of county canvassers is purely ministerial; he has no authority to sit in judgment upon the action of that body, and may not refuse to certify as correct, and attest by his signature, a statement made by the board of the result of an election, because, in his opinion, it does not give the correct legal result. If the statement, as made, correctly sets forth the action of the board, it is his duty to certify and sign it, without regard to the question as to whether the board has done its duty in a valid way or not. *Id.*

17. In case the county clerk refuses to perform his duty in this respect, the remedy is not confined to the procuring of a mandamus to compel performance, but the board has power to designate one of its number as secretary *pro tem.*, to make the certificate and attest under its direction the correctness of the statement, to file it in the county clerk's office, and to prepare and send certified copies thereof to the proper state officers, in case of the refusal of the county clerk as such so to do. *Id.*

18. Where, upon application for a writ of mandamus requiring the state board of canvassers to disregard the return made by a board of county canvassers, the moving papers alleged, in substance, that the county board illegally canvassed the result of the returns made to it by the inspectors of election and made up its canvass in opposition to said returns, thereby giving a plurality to one candidate when the returns showed that the opposing candidate was elected, and then made a return to the state board, proper and valid on its face, but which gave the results of such illegal canvass, and these allegations were not denied in the opposing papers, *held*, that the court below, in its proper branch, would have the power to command the state canvassers to canvass without regard to such return; also, that in case another return, properly authenticated, containing the result of a legal canvass was subsequently sent, that the state board could canvass it. *Id.*

19. The office of a board of state canvassers is purely ministerial, no judicial powers are vested in them. They are simply authorized to compute the votes cast throughout the state and determine, upon statements made up from the returns of the boards of county canvassers, what persons have received the greatest number of votes, and upon the statements so made they must declare those persons to be duly elected. No other evidence may be received or used and no declaration may be made by such a board except as based upon a determination arrived at by the statements made up by it in an arithmetical manner from the various official returns before them. *In re People ex rel. Derby* v. *Rice.* 461

20. The statement returned by a board of county canvassers to the state board may not lawfully contain anything save the whole number of votes given in the county,

the names of the candidates, and the number of votes given for each, and this must be made up solely from the original statements of the canvass returned by the inspectors in each and all of the election districts of the county. *Id.*

21. Such a board has no authority to transmit with their official return any paper attacking the validity of the election, and if such a paper is so transmitted the state board has no power to consider it. *Id.*

22. Where the sample ballots attached to a return of inspectors of election to the board of county canvassers show that the candidate was correctly named in the ballots, but through mistake or clerical error they are returned in a name differing slightly in the spelling or in some other particular, upon refusal of the said board to send back the return for correction, the candidate is entitled to a mandamus requiring it so to do before canvassing the vote. *People ex rel. Munro* v. *Bd. Co. Canvassers.* 469

23. The rule that the statement of votes cast for a candidate, written as required by the statute, upon a sample ballot attached to the return, may not be used by the board of county canvassers as the correct statement, when it differs from the statement of such vote given in the body of the return, but that the latter must govern, does not preclude the board, when it is material to determine the correct name of the person voted for, from inspecting the sample ballot. *Id.*

24. Where, however, upon application for a mandamus compelling the return and correction of a number of returns so defective, it appeared that the indorsement upon the official ballots used and voted in some of the election districts which contained the name of the candidate upon whose relation the application was made were defective in that the number of the election district was not stated therein, but instead thereof that of another district, *held* (ANDREWS, FINCH and PECKHAM, JJ., dissenting), that a provision in the order granting the writ requiring the county canvassers when the erroneous returns were corrected, to proceed and canvass the vote as it appeared on the face of the returns, and declare the result, was error. *Id.*

ELECTRIC LIGHT COMPANIES.

1. The relator, a domestic corporation, organized under the General Manufacturing Act (Chap. 40, Laws of 1848), is engaged in the business of producing electricity and supplying the same to customers for lighting purposes. In proceedings to review by certiorari a decision of the comptroller holding the relator liable to pay taxes and penalties imposed by the act of 1880, providing for the assessment and payment of taxes by certain corporations (Chap. 542, Laws of 1880), and the act of 1881, amending the same (Chap. 361, Laws of 1881), *held*, that it was a manufacturing corporation within the meaning of the provision of said act exempting such corporations, and so was exempt from taxation until the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause. *People ex rel. B. E. M. Co.* v. *Wemple.* 543

2. Where a corporation was organized under the act of 1848 (Chap. 37, Laws of 1848), providing for the incorporation of gas companies but under the authority given by the act of 1879 (Chap. 512, Laws of 1879), was exclusively engaged in generating and supplying electric currents for the purpose of illumination, *held*, that it was a manufacturing corporation within the meaning of the exemption clause of the act providing for the assessment and taxation of certain corporations (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881), and so was exempt from taxation prior to the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause; that the fact

that the corporation was not organized under the General Manufacturing Act did not affect its character as a manufacturing corporation. *People ex rel. E. E. I. Co.* v. *Wemple.* 664

EQUITY.

1. *It seems*, that an imitation of the names, signs or marks under which another conducts a business is a deception practiced upon the public and an injury to the proprietor in the loss of custom and patronage, to redress which the jurisdiction of a court of equity may be invoked. *Munro* v. *Tousey.* 38

2. This rule applies to the publication of books under a particular name; this is the subject of property, and a colorable imitation of the name adopted by one publisher by another engaged in publishing similar books, by which the public may be easily misled into supposing it is the literary article they desired to obtain and read, is an act of deception which injures the publisher who first adopted the name, and which he may call upon a court of equity to redress. *Id.*

3. This power, however, is only to be exercised to prevent fraud and imposition, and to justify the interference of the court there must be some real resemblance in the name and appearance of the publication, such as to deceive a person of ordinary intelligence and prevent him in the ordinary and natural use of his senses from ascertaining the difference. *Id.*

4. The equity resulting from a valid agreement by the owner of land, restricting the use thereof, although not a covenant running with the land or a legal exception or reservation out of it, but simply a personal contract, goes with the land into the hands of a purchaser from such owner, with notice, who did not buy innocently or in good faith, and this equity may be enforced by injunction. *Lewis* v. *Gollner.* 227

5. To warrant equitable relief in case of the infraction of such an agreement it is not essential that it should be binding at law, or that any privity of estate should exist between the parties, nor is it an objection that the contract is by parol. *Id.*

6. Where a court of equity gains jurisdiction of a cause for one purpose it may retain it generally, and to do complete justice between the parties, ascertain and award damages as incidental to the main relief sought. *Lynch* v. *Met. E. R. Co.* 274

7. Where, therefore, an equity court assumes jurisdiction to restrain a continuous trespass, in order to prevent a multiplicity of suits, it may proceed to give full relief, both for the tortious act and the resulting damages. *Id.*

8. The provision of the State Constitution declaring that: "The trial by jury in all cases in which it has heretofore been used, shall remain inviolate forever" (§ 2, art. 1), does not apply to the trial of issues of fact in an equity action; and this, although as incidental to the equitable relief sought, a money judgment is asked for and issues of fact are presented which might be the basis of an action at law. *Id.*

9. Equity will only enforce a parol contract for an interest in land when the contract is definite and certain in all its parts. *Crosdale* v. *Lanigan.* 604

ESTOPPEL.

A license to do some act upon the land of the licensor may not be changed into an equitable right on the ground of equitable estoppel. *Crosdale* v. *Lanigan.* 604

See FORMER ADJUDICATION.

EVIDENCE.

1. B., plaintiff's husband, and one W., entered into a contract with defendant for the purchase of a farm by them of him for $5,092.52, "and other stipulations and payments heretofore made and to be

performed;" these were not set forth. Indorsed upon the contract, however, was an agreement by the vendees to pay defendant in addition to said sum, $2,000 and interest, "secured in part" by a deed from B. and wife of certain lots belonging to her, said $2,000 to be paid to McL. prior to the execution of a deed by him to his vendees, and on a sale by McL. of the lots conveyed, the avails, after paying expenses, were to be applied on said $2,000. McL. subsequently conveyed the farm to the wife of W. for a new consideration agreed upon between them, and without the knowledge or consent of B. or his wife. In an action to compel defendant to reconvey said lots to plaintiff, and to pay her the rents received, defendant alleged in his answer and offered to prove on the trial that the deed of the lots was in fact delivered by plaintiff and accepted by him as an absolute payment of the $2,000. This was objected to and excluded upon the ground that the written contract was conclusive. *Held*, error; that the rule invoked was not applicable as between one of the parties to the contract and a stranger. *Blazy* v. *McLean*. 44

2. In an action upon a contract, by which defendant agreed to pay half the expense of building a party-wall, it appeared that plaintiff built flues in the wall which encroached upon defendant's half. Plaintiff's counsel called as a witness an architect and asked him if it was customary to build flues in party-walls. This was objected to; said counsel stated that he desired to show it was a proper thing to put a flue in a party-wall. The court sustained the objection. *Held*, error. *Hammann* v. *Jordan*. 61

3. To prove that the encroachment of the flues on defendant's land was not willful, plaintiff, as a witness in his own behalf, was asked whether he intended to have the wall built correctly with regard to the flues. This was objected to and excluded. *Held*, error; that it was competent for plaintiff to show that he did not encroach intentionally upon defendant's premises. *Id.*

4. Upon the trial of an action brought to recover damages for personal injuries, it appeared that plaintiff was injured by a collision between a street car of one of the defendants in which she was a passenger, and the truck of the other defendant, occurring while the car was crossing and the truck was passing along a street. A witness who had driven trucks for years was asked, and permitted to answer under objection and exception, a question as to within what time and space a loaded truck could be stopped. *Held*, no error; the court, however, stating that the question was barely competent, and that this class of testimony was not to be encouraged. *O'Neil* v. *D. D., E. B. A. B. R. R. Co.* 125

5. A conveyance, absolute upon its face, may be shown by parol or extrinsic evidence to be in reality merely a security, and to that end it is not essential to show fraud or mistake in the inception of the instrument. *Barry* v. *Colville*. 302

6. In an action against a special partner in a limited partnership to charge him, as general partner, with an indebtedness of the firm, plaintiff claimed that the contribution of the special partner to the capital of the firm was not made in cash, as stated in the certificate and accompanying affidavits filed, but was made by crediting him with an equivalent amount loaned by him to a pre-existing firm, composed of the general partners. To prove this, defendants offered, and were permitted, to give in evidence entries in the books of the old firm, showing loans to it by defendant to the amount of his alleged contribution, and an entry therein of a credit of a similar amount to his capital account with the new firm of the same date as that of the certificate. *Held*, error. *Kohler* v. *Lindenmeyr*. 498

7. The provision of the Code of Civil Procedure (§ 834), prohibiting the disclosure by a physician of any necessary information acquired in a professional capacity,

applies only to information the physician acquires in attending a patient; not to information obtained by him in any other way. *Fisher* v. *Fisher*. 654

EXCEPTIONS.

1. In an action to restrain the operation of an elevated railroad in a street in front of plaintiff's premises, the uncontradicted evidence showed, and the defendants' counsel requested the court to find, that the existence and operation of the railroad had greatly increased the population of the locality in which plaintiff's property is situated, and has brought traffic into the street, and thereby plaintiff's property has been incidentally benefited, and that there has been a general rise in the value of the real estate along the street, largely attributable to the road. The court refused so to find, and defendants excepted. Defendants also moved for a dismissal of the complaint on the merits, upon the ground, among others, that it appeared plaintiff's property had been benefited by the road, and had, by reason thereof, increased in value since its erection, which motion was denied and exceptions taken. The court found that plaintiff had sustained damage to the amount stated. *Held*, that the exceptions were sufficient to bring up the question as to whether the court had adopted the proper rule of damages. *Bohm* v. *Met. E. R. Co.* 576

2. Only questions of law raised by exceptions taken during the progress of the trial can be reviewed in this court. *Wicks* v. *Thompson*. 634

3. Where, therefore, the record on appeal to this court contains no exceptions, the denial of a motion for a new trial is not the subject of review here. *Id.*

EXECUTORS AND ADMINISTRATORS.

1. The will of T., executed in 1836, gave three-fourths of his residuary estate to his executors, in trust, to be held in three equal and separate parts, one for each of his three daughters until her arrival at the age of twenty-one, after that time the daughter to care for the realty and keep invested the personalty set apart for her share and have the rents and income accruing therefrom, "independent of her husband, if married," during life, the same to pass upon her death to her surviving children. The will then provided that in case either of the daughters married "and her husband be found capable and prudent in the management of property, and shall treat her and her family with kindness" and the executors shall first give to her "a written testimonial to that effect," she shall have in addition to the life estate an absolute property in and control over the share apportioned to her. By a codicil it was provided that each of the daughters, after her arrival of age, should have and hold the property apportioned to her "according to the several clauses and directions" of the will, during her life, if married, free from the control of her husband, and as if she "were *femme sole*," with remainder to her children. *Held*, that the codicil did not revoke the provisions of the will conferring upon the executors power, by giving the testimonial, to convert the life estate into an absolute title. *Viele* v. *Keeler*. 190

2. The words of the gift to the executors were "unto my said executor or executors who shall consent to act or may survive." *Held*, that upon the death of all of the executors but one, the survivor had power to execute the prescribed testimonial. *Id.*

3. Under and by the Code of Civil Procedure (§§ 2474, 2475, 2739), the power of a surrogate to permit proof of the claim of an executor or administrator against his decedent's estate is confined to the occasion of the judicial settlement of his accounts; the surrogate has no jurisdiction to entertain a proceeding solely for the purpose of proving the claim. *In re Ryder*. 640

FORECLOSURE.

1. Where the owner of the equity of redemption of mortgaged premises becomes bankrupt and his estate has passed into the hands of an assignee in bankruptcy, to cut off the interest of the latter by a foreclosure of the mortgage, he must be made a party defendant to the foreclosure suit in his representative or official capacity, or it must appear in some way on the face of the proceedings that they relate to or affect the bankrupt's estate; the fact that he was made a party individually is not sufficient, nor is it material that he knew the foreclosure related to lands owned by the bankrupt, and that he had no interest therein save as assignee. *Landon* v. *Townshend.* 166

2. Upon application for surplus moneys arising on foreclosure sale, it appeared that there were two mortgages which were liens upon the premises sold subsequent to the mortgage foreclosed; the senior one also covered other lands, which the proof showed and the referee found were of value more than sufficient to satisfy the mortgage, and the junior mortgage only covered those premises. *Held,* that the court had no power to displace the prior lien in favor of the junior mortgage, and to compel the owner of the former to resort to the other lands covered by it to obtain payment. *Cannon* v. *Washburn.* 485

3. As to whether, if the owner of the junior mortgage had offered to pay the prior one and demanded an assignment of it, he could have been subrogated to all the rights of its owner as against the other real estate, *quære.* *Id.*

FORMER ADJUDICATION.

1. P. & L. effected insurance under an open policy of marine insurance for advances made to the captain of a vessel named for a voyage specified; before this they had written to the owners of the vessel that its captain had drawn upon them and asked whether the owners would remit the amount or would have them advance it. P. & L. after the insurance received an answer from the owners asking them to insure the advances if it had not already been done, so that in case of loss the owners would not be called upon for reimbursement. P. & L. replied that they had "covered the amount by insurance." A loss having occurred plaintiff, without knowledge of the correspondence between P. & L. and the owners, paid that firm the amount of the advances. In an action to recover back the same, plaintiff introduced in evidence on the trial the record of a judgment of the U. S. District Court, in an action instituted by filing a libel against the vessel, to recover the amount paid to P. & L. By the judgment the libel was dismissed. *Held,* that the record was properly received in evidence, and that plaintiff was entitled to recover as damages, in addition to the advances, the amount of costs paid by it in that action. *Phœnix Ins. Co.* v. *Parsons.* 86

2. It is not sufficient for a party, who sets up a prior judgment as a bar, to produce a record showing a judicial determination in his favor of the question in litigation; he must also show that the judgment was rendered upon the merits, that the question was a material one in the former action, and that it was disposed of upon substantially the same facts as are presented in the subsequent action. *Shaw* v. *Broadbent.* 114

3. In an action to enforce the specific performance of a parol contract to convey land, these facts appeared and were found: That defendant agreed to build a house on a lot owned by him and to convey the premises to plaintiff for $1,200, to be applied on an account plaintiff had against defendant. The house was built and possession given to plaintiff, and she still continues in possession thereof. Plaintiff thereafter brought an action against defendant on the account without crediting the $1,200. An attachment was issued therein, under which defendant's property was levied upon. The attachment was vacated and thereupon the defend-

ant brought an action upon the undertaking, given when the attachment was issued, to recover his damages. In her answer in that action the plaintiff here set up the said contract as a defense, and demanded a conveyance of said premises in accordance therewith. No reply was served. Upon the trial of that action, the counsel of the defendant therein (the plaintiff here) offered to prove said contract; this was objected to by plaintiff and the evidence excluded the court holding that the effect of the complaint in the action upon the account was to waive the agreement, plaintiff therein having elected to sue for the money instead of giving the credit and taking the land. The court, in the action upon the undertaking, found that said premises were the property of and belonged to the plaintiff therein, that none of the allegations of defendant's answer were sustained, and rendered judgment in favor of said plaintiff for his damages. Thereupon the plaintiff here, in her action upon the account, moved for leave to amend her complaint by inserting an allegation as to the contract and giving the credit. This motion was granted, as the court stated, without passing upon or adjudicating the question whether such an agreement was made, and without impairing the effect of the decision and adjudication in the action on the undertaking upon the rights of the parties. The complaint was amended accordingly, and the defendant answered denying generally its allegations, without setting up the judgment in his favor. The trial resulted in a finding that the alleged contract was made; that defendant built the house and gave possession thereof to plaintiff, and that she had since occupied, claiming to own it, with the understanding that she was to credit the defendant with $1,200 on account. This, with payments made, satisfied the account in full, and a judgment was directed in favor of defendant, dismissing the complaint. Defendant entered judgment thereon. The court in the present action dismissed the complaint on the ground that the judgment in the action on the undertaking was a bar. *Held*, error; that, on the contrary, the former judgment in the action on the account was an adjudication in plaintiff's favor, upon the material issue in this action, and inasmuch as the defense plead to the action on the undertaking was irrelevant as a defense or counter-claim, the ruling thereon did not affect the conclusive force of the subsequent adjudication in plaintiffs' favor. *Id.*

4. Also *held*, that if said judgment could be considered as an adjudication that plaintiff had waived her right to a specific performance, its conclusiveness as a bar was taken away by the amendment of the complaint; as when, by such amendment, credit was given for the contract price of the land, it could no longer be considered that plaintiff had, by that action, waived her rights under the contract, or elected to take money instead of the land. *Id.*

5. Also *held*, that, conceding defendant's judgment was an adjudication in his favor as to the validity of the contract of purchase, there was an equally valid adjudication against him; and that the one estoppel neutralized the other, and so the question was left open to be again tried. *Id.*

6. The will of T., executed in 1836, gave three-fourths of his residuary estate to his executors, in trust, to be held in three equal and separate parts, one for each of his three daughters until her arrival at the age of twenty-one, after that time the daughter to care for the realty and keep invested the personalty set apart for her share and have the rents and income accruing therefrom, "independent of her husband, if married," during life, the same to pass upon her death to her surviving children. The will then provided that in case either of the daughters married, "and her husband be found capable and prudent in the management of property, and shall treat her and her family with kindness," and the executors shall first give to her "a written testimonial

to that effect," she shall have, in addition to the life estate, an absolute property in and control over the share apportioned to her. By the judgment in an action for a partition of the real estate of which the testator died seized, certain real estate was allotted and set off to each of the daughters to be vested, as the decree declared, in her during her life, with remainder in fee to her issue. Subsequently the sole surviving executor executed to each of the daughters a testimonial, as required by the will. M., one of said daughters, died in 1889, leaving a will by which she devised all of her property to plaintiff, her husband, who subsequently entered into a contract to sell and convey a portion of the real estate set apart to her by said decree, by full covenant warranty deed to K., who, upon being tendered such a deed, refused to complete the purchase, alleging that plaintiff did not own the fee. Upon a case submitted under the Code, *held*, that upon the execution and delivery of the certificate the absolute fee in the lands set apart for her was vested in M.; that this included the lands set apart for her in the partition suit; that the rights of M. and her devisee were not affected by the provision of the decree in partition declaring that she had simply a life estate, as that estate was subsequently changed into a fee by the executor's certificate. *Viele* v. *Keeler*. 190

7. In an action brought by an assignee for the benefit of creditors, to recover damages for the unlawful taking and conversion of certain of the assigned personal property, it appeared that the property was taken by a sheriff by virtue of certain attachments against K., the assignor, among them one issued in actions brought by defendants H. and M. Defendants justified the taking on the ground that the assignment was fraudulent and void. Plaintiff offered in evidence a judgment-roll in an action brought by H. and M. against plaintiff and K. to set aside the assignment on the ground of fraud, which was decided in favor of the defendants therein; the court adjudging the assignment to be valid. This was received, as against H. and M. alone, under objection and exception. *Held*, no error; and that the judgment was conclusive as to the validity of the assignment as against the plaintiffs in that action; that the fact that it was necessary for them to show a judgment in their favor and the return of an execution unsatisfied did not affect the character of the action; nor did the fact that plaintiff, for the purpose of connecting said defendants with the unlawful taking, introduced in evidence a bond of indemnity executed by them to the sheriff; that in both actions they represented only individual interests; also, the fact that the judgment-roll was inadmissible as against the other defendants did not affect its competency as against H. and M. *Dyett* v. *Hyman*. 351

8. The action was, by leave of the court, discontinued upon payment of costs as against all of the defendants except H. and M. *Held*, that if the other defendants could have been prejudiced by the admission of the roll, they could not, after the discontinuance, avail themselves of the objection. *Id.*

FRAUD.

G., who was insolvent, ordered certain goods of plaintiffs on the 7th of March, 1884, which were received and accepted by him on the sixteenth; on the twenty-second of that month G. failed and made an assignment. Upon the trial of an action to recover possession of the goods, which plaintiff claimed were purchased by G., with knowledge of his insolvency and with the preconceived design not to pay therefor, the court in its charge treated the order as the purchase and charged that the question was the intent of G. at that time. Plaintiff's counsel requested a charge that notwithstanding what G. may have thought when he made the purchase, if when he received the goods he knew or had reasonable cause to know, he could not go on in business, he is equally

chargeable with an intent not to pay. This the court refused to charge, saying "the intent must be at the time the contract was made." *Held*, error. *Whitten* v. *Fitzwater*. 626

See DECEIT.

FRAUD (STATUTE OF).

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCES.

1. A general creditor having no judgment, cannot maintain an action to set aside a conveyance by his debtor in fraud of the rights of creditors. *Briggs* v. *Austin*. 208

2. Where an assignment for the benefit of creditors, executed by the members of a firm, by its terms assigned all the partnership property and the individual estate of each of the assignors, and, after preferring certain firm creditors, directed the assignee with the residue to pay in full all other debts and liabilities of the assignors, "together or respectively," and if the residue was insufficient, to apply it toward such payment "ratably and in proportion," and it appeared that there were individual debts, *held*, that the assignment was upon its face fraudulent and void as to the firm creditors, as its effect was in one contingency to devote part of the partnership property to the payment of all individual debts of the assignors before payment in full of all the partnership debts; also that it was not validated by the fact that the assets were insufficient to pay the preferred debts. *Boos* v. *Marion*. 536

HIGHWAYS.

1. Prior to the construction of defendant's elevated railroad in a street in the city of New York, premises abutting on said street, then a vacant lot, were leased to one S. for a term of years, the lessor covenanting that, if during said term the lessee erected upon said lot a building of a character described, she would at the expiration of the term pay the value of the same or grant a renewal for another term. The lessee built upon said premises and thereafter assigned the lease to plaintiff, who took possession and has since then been in possession. After the construction of defendants' road and upon the expiration of the term, the lessor, in accordance with the covenants of the lease, executed to plaintiff a new lease which contained similar provisions as to renewal and the purchase of the building on the premises. In an action to restrain the operation of said road and for damages, the court granted the injunction, unless defendant paid a sum fixed as the value of the easements appropriated or interfered with, and awarded damages for injuries to the property during the six years preceding the commencement of this action. *Held*, no error; that plaintiff's title and right of possession date from the assignment of the lease to him; that the new lease must be regarded as simply a continuation of the prior one; that plaintiff for the purposes of the case was to be construed as the owner of the building and was entitled to recover such sum as represented its diminished rental value caused by the construction and operation of the road. *Kearney* v. *Met. E. R. Co.* 76

2. An owner of property in the city of New York abutting on a street, through which an elevated railroad has been built, without having acquired his easements therein, may recover damages for depreciation in the rental value thereof caused by the construction and operation of the road, while such premises are in the actual possession of tenants occupying under lease from him. *Mortimer* v. *Manhattan R. Co.* 81

3. The owner of such property died after the construction of the road, leaving a will by which he devised the premises to his executors in trust. *Held*, that an action was maintainable by them to recover damages at least to the extent of the diminution of the rental value

of the property caused by the road after the death of the testator; that they represented all the rights their testator could have asserted prior to his death and the remedy then existing was not lost or impaired by his death. *Id.*

4. The rule giving to the cars of a street railway corporation the preference and a superior right of way in the street where its tracks are laid, does not apply to streets crossing the railway; at such crossings its cars have no rights superior to those of vehicles moving in the streets crossed. *O'Neil* v. *D. D., E. B. & B. R. R. Co.* 125

5. The legislature, by virtue of its general control over public streets and highways, has power to authorize structures in the streets for the convenience of business, which, without such authority and under the common law, would be held to be encroachments and obstructions. *Hoey* v. *Gilroy.* 132

6. This power it may delegate to the governing body in a municipal corporation. *Id.*

7. Where a statute contains two distinct provisions, one specific, with precise directions to do a particular thing or permit it to be done; the other general, prohibiting certain acts, which, in their general sense include the particular thing, the prohibitory clause does not control the specific authority, but the latter is to be considered in the nature of an exception to the former. *Id.*

8. In an action to restrain defendants, officials of the city of New York, from removing an awning over the sidewalk in front of plaintiff's place of business in said city, it appeared that said awning was originally erected by plaintiff in compliance with the requirements of an ordinance passed by the common council, and upon the passage of another ordinance changing such requirements it was, upon the request and with the consent of the city authorities, made to conform therewith. The city authorities subsequently notified plaintiff to remove the obstruction, claiming the right so to do under the Consolidation Act (§ 86, chap. 410, Laws of 1882), which empowers said common council to make ordinances "to prevent encroachments upon and obstructions to the streets * * * and to authorize and require the commissioner of public works to remove the same," declares that "they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk," except temporarily (sub. 4), and authorizes them "to regulate the use of streets and sidewalks for signs, sign-posts, awnings, awning-posts * * * and other purposes" (sub. 8). *Held*, that conceding the awning constituted an encroachment on the street and, as to the public was an obstruction, and so would be included in the general prohibitory clause, the power to regulate awnings gave to the common council the power to authorize their erection and maintenance, and this power was not taken away by the prohibition; that such a structure was intended to be excepted from said prohibitory clause; and that, therefore, the structure in question was not an illegal obstruction of the street, and while the common council could abate such structures by a repeal or modification of the ordinance, until this was done defendants had no right to interfere therewith. *Id.*

9. In an action commenced in 1888, to restrain the operation and maintenance of defendants' elevated railroad in a street in the city of New York, in front of plaintiff's premises, and to recover damages for past injuries, these facts appeared: Defendants' predecessor, the W. S. & Y. P. R. Co., in 1867, in pursuance of an act entitled "An act to provide for the construction of an experimental line of railway in the counties of New York and Westchester" (Chap. 489, Laws of 1867), constructed an elevated railroad on the east side of said street, in accordance with the requirements of the act, *i. e.*, a single track, the supporting columns of which were placed along the curbstone line; this road was operated by a cable; a bond conditioned for

the payment of damages to property owners was given by said company as required by the act (§ 11). In 1868, having received the certificate of the commissioners required by the act (§§ 3, 5), before the road could be operated, the company commenced the operation. In 1871, steam dummies were substituted as the motive power. In 1872, said company transferred its property and franchises to the defendant, the N. Y. E. R. Co., which transfer was confirmed by the legislature (Chap. 595, Laws of 1875); thereafter, turnouts were built at different times and a track on the west side of the street constructed. In 1879, the track on the east side was reconstructed; the columns were removed from the curb line to a line sixteen inches within the sidewalk. Since 1878, the road has been operated by trains drawn by steam engines. Plaintiff became the owner of the premises in question in 1883. The court found that part of the light, air and access of these premises was taken for the use of the railroad in 1868, and has been continuously used ever since for railroad purposes, but refused to find that before this action was commenced, the presumption of a grant of the right to maintain and operate an elevated railroad on the east side of Greenwich street, from the then owner of said property to the defendants' predecessor company, had become conclusive by lapse of time. *Held*, no error; that the original entry by defendants' predecessor was not under a general claim of right, but under a specific legislative grant, beyond which nothing was claimed, and so, at least until the action of the commissioners, it was merely temporary and experimental; that while the possession thereafter was adverse, the changes made in 1879 were material and substantial, injuriously affecting the rights of property owners, and the right thereafter claimed was not identical with the original user; that the fact that some undefined and non-separable part of plaintiff's rights in the street, taken originally, were also taken by the changed structure did not give title to that part, although continuously used for twenty years; that having been so used as an integral element of two different users, it must share the fate of such users, and as neither was continuous for the period required, no prescriptive right had been acquired. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

10. An elevated railroad in a city street, erected and operated without the consent of the owners of property abutting upon the street, or without having acquired their rights therein, being illegal, such an owner is entitled to recover all damages of every kind caused to him while such road is so illegally maintained and operated. *Messenger* v. *Manhattan R. Co.* 502

11. Where, however, in an action by an abutting owner to restrain the operation of the road, the defendant is permitted to pay the damage to the fee, in estimating those damages the evidence must be confined to what the railroad company is authorized to take or interfere with, to wit, the easements of light, air and access. *Id.*

12. An abutting owner, by reason of his situation, has certain rights and privileges in a city street termed easements, which are appurtenant to his land, and are a species of property. The beneficial enjoyment of these easements is interfered with by the erection and operation of an elevated railroad in the street. This interference is a taking of them *pro tanto*, and entitles the owner to payment therefor, and in addition the damage done his adjoining land. *Bohm* v. *Met. E. R. Co.* 576

13. As however, these easements are of no value in and of themselves separated from the land, the real and only damage, if any, suffered by the owner in any particular case is a consequential one, *i. e.*, the effect produced upon his abutting land. *Id.*

14. The question is simply as to the actual result upon the land remaining, *i. e.*, has the actual market value been decreased by the taking,

or has it prevented an enhancement in value greater than has actually occurred; and if so, to what extent? The damage defendant may be required to pay is the difference between the actual market value of plaintiff's land and what it would have been worth if the railroad had not taken the other property, *i. e.*, the easements. *Id.*

15. Where, therefore, it appears that there has been neither a decrease in value nor any prevention of an increase caused by the railroad, plaintiff is entitled only to nominal damages. *Id.*

16. So, also, *it seems*, where it appears that the plaintiff's abutting land has actually increased in value, unless it is shown that but for the acts of the defendants in taking the easements, it would have grown still more in value, no damage is proved. *Id.*

17. It is not essential to show that plaintiff has received benefits from the taking special and peculiar to his land, not shared in generally by other abutting owners. *Id.*

18. Under the act of 1854 (§ 1, chap. 352, Laws of 1854), "enlarging the powers and duties of the trustees" of the village of Canandaigua, the jurisdiction of said trustees with respect to the village streets and sidewalks became absolute, like that of commissioners of highways; by virtue of this enlarged jurisdiction they were invested with general powers and corresponding duties, and the responsibility for their proper performance devolved upon the municipal corporation as such. *McSherry* v. *Village of Canandaigua.* 612

19. Accordingly *held*, that the village was liable for injuries caused by neglect on the part of the trustees to keep a sidewalk in repair. *Id.*

HORNELLSVILLE (CITY OF).

A member of the board of park commissioners, appointed under and in pursuance of the act of 1891, (Chap. 308, Laws of 1891), providing for a public park in the city of Hornellsville, is an officer under the city government within the meaning of the provision of the State Constitution providing "that no person shall be eligible to the legislature who, at the time of his election is, or within one hundred days previous thereto has been, * * * an officer under any city government." (§ 8, art. 3.); *In re People ex rel. Sherwood* v. *State Bd. Canvassers.* 360

HUSBAND AND WIFE.

1. A married woman may take and hold real property as a joint tenant with her husband, and where by a deed to herself and her husband it appears plainly that the intent was to convey to her not merely as a wife, but separately, by virtue of her individual right, as joint tenant with him, she has the right to dispose of her interest independent of her husband. *Jooss* v. *Fey.* 17

2. Certain premises were, in 1882, purchased by F. and his wife, each contributing to the purchase-money from his and her separate estate. The words of the grant were to "the parties of the second part as joint tenants and to their heirs and assigns," and the habendum clause was to them "as joint tenants and not as tenants in common." The wife subsequently conveyed her interest in the premises to plaintiff. In an action for a partition thereof, *held*, that the wife took and held as joint tenant with her husband, not as tenant by the entirety; that she had power to convey, and by her deed plaintiff acquired her interest (§ 3, chap. 200, Laws of 1848, as amended by chap. 375, Laws of 1849); and that the action was maintainable. (Code Civ. Pro. § 1532.) *Id.*

See ALIMONY.

INJUNCTION.

1. Plaintiff was the publisher of a series of detective stories; to designate the series, he had adopted the

name of the "Old Sleuth Library," and "Old Sleuth, the Detective," was designated as their author. Defendant published a series of similar stories which he named the "New York Detective Library." This series contained publications by titles, some of which contained the words "Young Sleuth," others "Sleuth." There was a marked difference in the illustrations upon the covers of the two series. *Held*, that an action was not maintainable to restrain defendant from so using the word "Sleuth" in connection with his publication; that the pseudonym "Old Sleuth" was plaintiff's property; but he had no such property rights in the word "Sleuth" as would justify the interference of the court in preventing its use by defendant, in the absence of proof of similarity in the publications, or of other facts tending to show an intent on his part to mislead purchasers. *Munro* v. *Tousey*. 38

2. To justify this court in dissolving a temporary injunction, where the inevitable result will be the defeating of plaintiff's remedy without a trial, it must be satisfied that the case is one in which, by settled adjudication, the plaintiff, upon the facts stated, is not entitled to final relief. *Young* v. *R. & K. G. L. Co.* 57

3. In an action by a stockholder of a gas light company, to prevent its consolidation with an electric light, heat and power company, the complaint alleged that the proposed consolidation, if carried out, would be ruinous to the stockholders of plaintiff's company; that the two corporations are not so similar as to come within the act authorizing the consolidation of manufacturing corporations (Chap. 367, Laws of 1884); that that act is permissive merely, and does not exclude the interference of the court to prevent a wrong and injustice, and is, in some of its features, unconstitutional. No answer was interposed, and upon the complaint and affidavits of plaintiff and defendant's treasurer and president, and after hearing both parties, an injunction *pendente lite* was granted restraining the consolidation. *Held*, an order of General Term affirming the order of the Special Term was not reviewable here. *Id.*

4. The equity resulting from a valid agreement by the owner of land, restricting the use thereof, although not a covenant running with the land or a legal exception or reservation out of it, but simply a personal contract, goes with the land into the hands of a purchaser from such owner, with notice, who did not buy innocently or in good faith, and this equity may be enforced by injunction. *Lewis* v. *Gollner*. 227

5. To warrant equitable relief in case of the infraction of such an agreement, it is not essential that it should be binding at law, or that any privity of estate should exist between the parties, nor is it an objection that the contract is by parol. *Id.*

6. Defendant G., who was a builder of flats and tenement-houses, entered into a contract to purchase a lot fronting on a street in the rear of plaintiff's residence for the purpose of erecting thereon a flat or tenement-house. This street was then occupied by private residences of a superior character, and the contemplated structure would be an injury and damage to the neighboring premises. The price G. had agreed to pay was the full value of the premises; he had paid thereon but $500. Failing to induce G. to refrain from erecting such a building, certain owners in the neighborhood, including plaintiff, for the sole and declared purpose of saving the neighborhood from flats, purchased and took an assignment of the contract at an advance of $6,000, upon the oral agreement by defendant "that he would not construct any flats in plaintiff's immediate neighborhood or trouble him any more." G., however, soon thereafter purchased other premises in the neighborhood and commenced erecting a large flat thereon, and upon being threatened with an action he conveyed the premises to the other defendant, his wife, nominally in exchange for other property of

comparatively small value, and then as her agent and architect continued the construction. The wife took title, with full knowledge of all the facts and for the purpose and with the intent of aiding and protecting her husband in his effort to avoid his contract. *Held*, that plaintiff was entitled to an injunction restraining the proposed erection, or the use of any structure on the premises as a flat. *Id.*

7. *It seems*, where a peremptory mandamus is applied for, which by its terms acts as a restraint upon a board of state officers, engaged in the performance or about to perform a duty imposed by statute, and it is sought for to be used as a restraining order or injunction, the limitation upon the granting of such an injunction imposed by the Code of Civil Procedure (§ 605) applies; that is, it "shall not be granted except by the Supreme Court at a General Term." *In re People ex rel. Derby* v. *Rice*. 461

INSURANCE (LIFE).

1. Where a life insurance association, which proposed to issue certificates of membership to those becoming members, with a statement in each certificate that certain sums received thereon should be paid over to a trust company, as a safety fund for the security of the members, to be paid out by the trustee in the manner specified, entered into a contract with the trust company, by which the latter agreed to receive and hold this fund and pay it out in the manner and for the purposes so specified, *held*, that the court had no power, on a voluntary dissolution of the corporation, to order said trustee to pay over the trust fund, deposited in pursuance of the agreement to the receiver appointed in said proceedings. *In re H. P. S. F. Assn.* 288

2. Also *held*, that the question was not affected by the fact that the agreement stated that the fund belonged to the association, subject to the execution of the trust. *Id.*

INSURANCE (MARINE).

1. The firm of P. & L. held an open policy issued by plaintiff, consisting of a cargo policy and annexed thereto a freight policy. By the cargo policy the insurance was "on cargo, freight and advances." It contained a clause to the effect that "the freight and advances insured under this policy are subject to the terms and conditions of freight policy attached." *Held*, that the meaning of this clause was not that the freight policy should control alone as to insurance on advances, but that to the terms and conditions of the cargo policy was to be added such of those contained in the freight policy as were pertinent and might concern the risk insured. *Phœnix Ins. Co.* v. *Parsons*. 86

2. The "cargo policy" contained a clause to the effect that in case of any agreement by the insured whereby they relinquished any right of recovery against others, which in case of payment of loss by plaintiff would belong to it but for the agreement, it would not be bound to pay the loss. P. & L. effected insurance under the open policy for advances made to the captain of a vessel named for a voyage specified; before this they had written to the owners of the vessel that its captain had drawn upon them and asked whether the owners would remit the amount or would have them advance it. P. & L. after the insurance received an answer from the owners asking them to insure the advances if it had not already been done, so that in case of loss the owners would not be called upon for reimbursement. P. & L. replied that they had "covered the amount by insurance." A loss having occurred plaintiff, without knowledge of the correspondence between P. & L. and the owners, paid that firm the amount of the advances. In an action to recover back the same *held*, that said clause applied to the insurance in question; that the condition was broken, as the reply of P. & L. was an advice to the owners that their request as to insurance was complied with, and so the insurance became one for the

owners' benefit, and P. & L. were estopped from asserting any claim against the owners for the advances; and, therefore, plaintiff was entitled to recover; that it was not material that the owners' letter of instruction was received after the insurance. *Id.*

3. The amount of the insurance was $1,500, the sum advanced was $1,125. P. & L.'s claim against the owners was for $1,570; this included commissions of $341.63 for procuring a charter for the vessel. Plaintiff, with knowledge that the claim included the commissions, paid the whole amount of the insurance, taking an assignment of $1,500 of said claim; this the assignment stated was "for advances, commissions, etc." *Held*, that said commissions constituted no interest in or lien upon the vessel, and so as to this portion of their claim P. & L. had no insurable interest and it was not covered by the policy; that while the assignment did not pass any claim against the owners arising out of the advances, as that had been released by the assured, it did pass that portion of the claim charged for commissions and this plaintiff could enforce against the owners, and so it was entitled to recover only the balance, after deducting the commissions from the claim. *Id.*

4. Plaintiff introduced in evidence on the trial the record of a judgment of the U. S. District Court, in an action instituted by filing a libel against the vessel, to recover the amount paid to P. & L. By the judgment the libel was dismissed. *Held*, that the record was properly received in evidence, and that plaintiff was entitled to recover as damages, in addition to the advances, the amount of costs paid by it in that action. *Id.*

5. The phrase "for whom it may concern" or any other terms of equivalent import, in a policy of marine insurance will be applied to the interest of any party for whose benefit it was intended by the person who procured or ordered the insurance. *Duncan* v. *China Mut. Ins. Co.* 237

6. A party, therefore, who has an interest in the property covered by the policy at the time of a loss, will be protected without an express stipulation to that effect, although he had no interest at the commencement of the risk, provided such an interest was intended to be insured. *Id.*

7. A policy of marine insurance was issued by defendant, to plaintiff, "on account of whom it may concern, in case of loss, to be paid" to a corporation of which plaintiff was general manager and owner of nearly all of its stock. The vessel insured belonged to said corporation. The policy contained a stipulation that a change of interest in the vessel should not affect the validity of the policy. Plaintiff thereafter, in behalf of his company, sold the vessel insured to another corporation. Part of the purchase-price was secured by a mortgage on the vessel running to plaintiff, and by the contract of sale it was agreed that the insurance should stand and be held for the benefit of all interests until other policies could be obtained. The vessel insured was lost during the life of the policy which remained in plaintiff's possession; his company orally assigned to him its claims thereunder and the purchasing corporation, instructed him to collect the insurance. In an action brought by the plaintiff in his own name upon the policy, the complaint set forth all the facts showing his connection with the transaction, the sale of the vessel and the title to the same, the execution of the mortgage to him and the agreement in regard to the insurance, and that at the time of the loss he held the policy under an agreement between all the parties interested that it should stand in his hands as an indemnity to him in case of loss. No objection was made to the proofs of loss before the commencement of the action and no point was raised as to defect of parties plaintiff either by demurrer or answer. *Held*, that the objection as to non-joinder of parties plaintiff was waived (Code Civ. Pro. §§ 488, 498, 499); that it was the intent of the parties that the

protection and benefit of the insurance should be extended to persons who should subsequently acquire, and at the time of a loss have, an interest in the property insured under transfers from the insured, and so included the interest of said vendee; that plaintiff as trustee or assignee of his company was entitled to recover such interest as it had in the policy, and also as trustee the interests of said vendee. *Id.*

8. Plaintiff loaned to the master of a vessel a sum of money, upon pledge of the vessel and cargo. By the instrument creating the lien, the master agreed to pay the loan on arrival of the vessel at the port of destination, and assigned enough of the freight to cover it. In case of total loss the loan was not to be paid. On the back of the instrument was printed certain conditions, to which the loan was made subject; among them, one declaring that the owner or captain should not take any other advances upon the same freight at the port of loading, or in such case should hold themselves "bound to return the present loan, even though the vessel be lost." In an action upon a policy of insurance issued by defendant on the advances so made, it appeared that the master did take a further loan upon the freight at the port of loading, but without the knowledge, privity or consent of plaintiff or its agents. The vessel was lost after sailing from the port of loading by perils of the sea. *Held*, that the maritime character of plaintiff's loan and its insurable interest was not affected by the wrongful act of the master; and so, that it was no defense to the action; that the obligation of the master arising out of his act was collateral merely to the principal security, *i. e.*, the lien, and in no way affected its validity, or that of the insurance thereon. *Cassa Marittima* v. *Phœnix Ins. Co.* 490

JOINT ADVENTURE.

P., a merchant doing business in New York, and St. A., a merchant in France, entered into a contract which, after reciting that D., the owner and packer of a certain brand of sardines was willing to give them the monopoly thereof, stated the agreement of the parties to be that they were to advance eighty per cent of cost of each invoice as forwarded from the factories; each to advance one-half; the sardines to be shipped to P. and sold, and the net profits to be divided equally between the parties and D. In pursuance of the contract, sardines were shipped to P., who borrowed of plaintiffs, a firm of bankers, the forty per cent agreed to be advanced by him. P. failed and made an assignment for the benefit of creditors. D. assigned his interest to St. A. Various creditors of P. brought actions against him, and upon attachments issued therein the sardines so sent were levied upon, as were also accounts for sardines sold. In an action to enforce an alleged banker's lien for the advances so made to P., a receiver was appointed, to whom was paid the proceeds of collection of accounts and of sales of the goods. *Held*, that the contract did not import to be a sale, but a joint enterprise; that St. A. had in equity a title to the goods or their proceeds superior to that of the individual creditors of P., and that this equity attached to the funds in the receiver's hands. *Drexel* v. *Pease*. 96

JOINT STOCK COMPANIES.

1. The revocation of the charter of a local assembly of the Knights of Labor does not destroy the property rights of the association as between itself and its debtors, nor does it destroy the right of the association or its officers to represent it or vest its property in any superior officer or body. *Wells* v. *Monihan*. 161

2. Where, therefore, in an action brought by the treasurer of such an assembly upon a promissory note given to it, *held*, the fact that the charter of the assembly had been revoked was not a defense. *Id.*

JOINT TENANTS.

See TENANTS IN COMMON AND JOINT TENANTS.

JURISDICTION.

1. The Supreme Court has no inherent power and, in the absence of a statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify on the trial as to the existence or extent of the alleged injury. *McQuigan* v. *D., L. & W. R. R. Co.* 50

2. The provision of the charter of the city of Albany of 1883 (§ 2, tit. XI, chap. 298, Laws of 1883), providing that if, in the proceedings relative to an assessment for a local improvement in said city of Albany, "any fraud or defect in the work, or substantial error, shall be alleged to exist or have been committed, the party aggrieved thereby may apply to have the assessment vacated or reduced," and giving the county judge jurisdiction to entertain the application, applies only to assessments thereafter made. *In re D. & H. C. Co.* 105

3. Accordingly, *held*, that the county judge had no jurisdiction to entertain an application to vacate an assessment made, completed and confirmed prior to the enactment of said charter. *Id.*

4. Residence of the owner within the assessment district is essential, under the Revised Statutes (1 R. S. 389, § 5), to give jurisdiction to assessors to make a valid assessment of personal property. *Wilcox* v. *City of Rochester.* 247

5. Where a court of equity gains jurisdiction of a cause for one purpose it may retain it generally, and to do complete justice between the parties, ascertain and award damages as incidental to the main relief sought. *Lynch* v. *Met. E. R. Co.* 274

6. Where, therefore, an equity court assumes jurisdiction to restrain a continuous trespass, in order to prevent a multiplicity of suits, it may proceed to give full relief, both for the tortious act and the resulting damages. *Id.*

7. The court may not release a lien, without actual payment, merely because the holder thereof has also a lien upon other property, to which he may resort for the satisfaction of his debt, and which the proof shows is sufficient for that purpose. *Cannon* v. *Washburn.* 485

8. Under and by the Code of Civil Procedure (§§ 2474, 2475, 2739), the power of a surrogate to permit proof of the claim of an executor or administrator against his decedent's estate is confined to the occasion of the judicial settlement of his accounts; the surrogate has no jurisdiction to entertain a proceeding solely for the purpose of proving the claim. *In re Ryder.* 640

——*The Supreme Court has authority over a trust fund, with power to grant allowances for costs and expenses, including attorney fees to one by whose efforts the fund has been secured or preserved.*

See Woodruff v. *N. Y., L. E. & W. R. R. Co.* 27

JURY.

The provision of the State Constitution declaring that: "The trial by jury in all cases in which it has heretofore been used, shall remain inviolate forever" (§ 2, art. 1), does not apply to the trial of issues of fact in an equity action; and this, although as incidental to the equitable relief sought, a money judgment is asked for and issues of fact are presented which might be the basis of an action at law. *Lynch* v. *Met. E. R. Co.* 274

KNIGHTS OF LABOR.

1. The revocation of the charter of a local assembly of the Knights of Labor does not destroy the property rights of the association as

between itself and its debtors, nor does it destroy the right of the association or its officers to represent it or vest its property in any superior officer or body. *Wells* v. *Monihan*. 161

2. Where, therefore, in an action brought by the treasurer of such an assembly upon a promissory note given to it, *held*, the fact that the charter of the assembly had been revoked was not a defense. *Id.*

LANDLORD AND TENANT.

1. Although a tenant at will cannot transfer any of his rights to another and his tenancy ends, if he makes such a transfer and surrenders the occupancy, the person taking it coming in as a trespasser only, yet where such person claims the right of occupancy simply by virtue of his assignment, the recognition and allowance of such claim by the owner of the premises makes the occupant a tenant at will the same as his predecessor, and his occupation continues the possession of the owner. *Landon* v. *Townshend*. 166

2. The building of a fence around land does not alone, as matter of law, necessarily constitute a taking of possession, and where the land is at the time occupied and cultivated by a tenant of one claiming title, and such occupancy continues without being interfered with in any degree and without any recognition by the tenant of any right in the builder of the fence as owner or occupant, and when it appears the fence was built without the knowledge of such claimant, a finding is justified that the building was a mere entry, not a termination of his possession. *Id.*

3. If the plaintiff in an action of ejectment fails to make a tenant in occupation of the premises a party, bringing the action against the landlord only, and the latter joins issue without pleading the non-joinder of the tenant, by his omission to so plead he waives the defect of the non-joinder and as he is a proper party (Code Civ. Pro. § 1503), the action must be tried upon the question of plaintiff's title and right to possession, although a recovery of the land cannot be enforced as against the tenant's occupancy. *Clason* v. *Baldwin*. 183

See LEASE.

LANDS.

See RIPARIAN OWNER.

LEASE.

1. In the absence of an agreement between the parties to a lease of agricultural lands, vesting the title to the hay produced thereon in the lessor, as security for rent, or for any other purpose, the law vests it in the lessee. *Briggs* v. *Austin*. 208

2. An agreement by the lessee in such a lease, to maintain upon the premises demised, certain cows belonging to the lessor, is an independent stipulation and does not affect the right of the lessee to sell the hay thereon, even if he be insolvent. *Id.*

See LANDLORD AND TENANT.

LICENSE.

1. A parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is revocable at the option of the licensor; and this, although the intention was to confer a continuing right and money has been expended by the licensee upon the faith of the license. *Crosdale* v. *Lanigan*. 604

2. Such a license, therefore, may not be changed into an equitable right on the ground of equitable estoppel. *Id.*

3. In an action to restrain defendant from tearing down a wall erected upon his land by plaintiff under an alleged parol license, it appeared that the parties owned adjoining

city lots. In grading his lot plaintiff raised an embankment along the line between the two lots. Defendant thereafter, in grading his lot, excavated the earth up to said line and to the embankment. In an interview between the parties plaintiff requested defendant to sell him two feet of his land to build a wall upon. Defendant declined at the time, but subsequently wrote plaintiff that he had decided to give him the two feet asked for. Plaintiff thereupon built the wall, and his attorney demanded a deed of the two feet. Defendant declined to execute a deed on the ground that he had not agreed to give a deed and that the wall was not built according to the understanding, and gave notice that he intended to tear it down. The trial judge decided in favor of plaintiff, on the ground that the license when executed became irrevocable. *Held* error. *Id.*

LIEN.

1. The court may not release a lien, without actual payment, merely because the holder thereof has also a lien upon other property, to which he may resort for the satisfaction of his debt, and which the proof shows is sufficient for that purpose. *Cannon* v. *Washburn.* 485

2. Upon application for surplus moneys arising on foreclosure sale, it appeared that there were two mortgages which were liens upon the premises sold subsequent to the mortgage foreclosed; the senior one also covered other lands, which the proof showed and the referee found were of value more than sufficient to satisfy the mortgage, and the junior mortgage only covered those premises. *Held*, that the court had no power to displace the prior lien in favor of the junior mortgage, and to compel the owner of the former to resort to the other lands covered by it to obtain payment. *Id.*

3. As to whether, if the owner of the junior mortgage had offered to pay the prior one and demanded an assignment of it, he could have been subrogated to all the rights of its owner as against the other real estate, *quære.* *Id.*

4. A maritime lien having once attached, cannot be divested, so as to avoid a policy of insurance thereon, without payment, release or some act on the part of the assured. *Cassa Marittima* v. *Phœnix Ins. Co.* 490

5. Plaintiff loaned to the master of a vessel a sum of money, upon pledge of the vessel and cargo. By the instrument creating the lien, the master agreed to pay the loan on arrival of the vessel at the port of destination, and assigned enough of the freight to cover it. In case of total loss the loan was not to be paid. On the back of the instrument was printed certain conditions to which the loan was made subject: among them, one declaring that the owner or captain should not take any other advances upon the same freight at the port of loading, or in such case should hold themselves "bound to return the present loan, even though the vessel be lost." In an action upon a policy of insurance issued by defendant on the advances so made, it appeared that the master did take a further loan upon the freight at the port of loading, but without the knowledge, privity or consent of plaintiff or its agents. The vessel was lost after sailing from the port of loading by perils of the sea. *Held*, that the maritime character of plaintiff's loan and its insurable interest was not affected by the wrongful act of the master; and so, that it was no defense to the action; that the obligation of the master arising out of his act was collateral merely to the principal security, *i. e.*, the lien, and in no way affected its validity, or that of the insurance thereon. *Id.*

See MECHANICS' LIEN.
MORTGAGE.

LIMITATION OF ACTIONS.

Under the Statute of Limitations an actual adverse title is not necessary to an adverse possession; a general

assertion of ownership will suffice if there be color of title, however groundless in fact. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

LODGES.

1. The revocation of the charter of a local assembly of the Knights of Labor does not destroy the property rights of the association as between itself and its debtors, nor does it destroy the right of the association or its officers to represent it or vest its property in any superior officer or body. *Wells* v. *Monihan*. 161

2. Where, therefore, in an action brought by the treasurer of such an assembly upon a promissory note given to it, *held*, the fact that the charter of the assembly had been revoked was not a defense. *Id.*

LONG ISLAND CITY.

1. The provisions of the charter of Long Island City, in reference to its water supply (Tit. 10, chap. 461, Laws of 1871), which provide for the apportionment and assessment of water-rates upon lots, without giving to the owners or occupants an opportunity for a hearing, are unconstitutional, and assessments made under it are void. *In re Trustees Union College*. 308

2. Also *held*, that assessments made under said charter were not validated by the acts of 1882 (Chap. 383, Laws of 1882), or of 1886 (Chap. 656, Laws of 1886). *Id.*

3. Upon appeal from an order in proceedings instituted under said act of 1886 (§ 10), to vacate an assessment, it was claimed that the remedy given by the act was inapplicable, as the alleged invalidity, *i. e.*, that an assessment could not be made upon vacant lots, did not appear upon the face of the proceedings. The assessment-rolls were not printed in the return. *Held*, that the objection was untenable; that as the form of the assessment-roll dictated by the charter would show, on its face, whether the rates were assessed against a village or a vacant lot, it was to be assumed that the fact appeared in the proper columns. *Id.*

4. But *held*, that the assessment was equally void whether the lands were vacant or had buildings upon them; and that it was immaterial whether the water was used or not. *Id.*

5. Also *held*, that the provision of said act of 1886 (§ 10), which requires any action or proceeding to test the validity or regularity of a tax, assessment or water-rate to be commenced within one year from the time of the delivery of the roll to the treasurer, is not retroactive, and so did not cut off the right to question a tax, where the time limited had expired prior to the passage of the act; that the limitation only applies to subsequent taxes and assessments. *Id.*

MANDAMUS.

1. A party can demand a mandamus only to secure or protect a clear legal right; never to accomplish a wrong, or the violation of a constitutional provision. *In re People ex rel. Sherwood* v. *State Bd. Canvassers*. 360

2. The writ, therefore, should not be granted upon the application of an individual, to compel the issuing of a certificate of election to one who has no right under the Constitution to hold the office. *Id.*

3. A member of the board of park commissioners, appointed under and in pursuance of the act of 1891 (Chap. 308, Laws of 1891), providing for a public park in the city of Hornellsville, is an officer under the city government within the meaning of the provision of the State Constitution providing "that no person shall be eligible to the legislature who, at the time of his election is, or within one hundred days previous thereto has been, * * * an officer under any city government." (§ 8, art. 3.) *Id.*

4. Upon application for a mandamus to compel the board of state can-

vassers to issue a certificate of election as state senator to the relator, who concededly had received the greatest number of votes for that office, it appeared that he had been duly appointed as a member of said board of park commissioners; that he duly qualified and was acting as such commissioner at the time of his election. *Held* (ANDREWS and FINCH, JJ., dissenting), that the writ was improperly granted; that a denial of the relief sought was not an interference with the jurisdiction of the senate given by the provision of the Constitution making each house of the legislature the judge of the elections and qualifications of its members (§ 10, art. 3) as it no way affected the right of that body, when it convened, to determine as to whether the relator was entitled to the office; that the refusal of the writ was simply an exercise of the jurisdiction the relator had invoked by refusing to aid him in a proposed intrusion into the office. *Id.*

5. Also *held* (ANDREWS and FINCH, JJ., dissenting), that the proceeding was simply one to enforce a civil remedy in favor of the relator, and could not be treated as in any sense one on behalf of the people, or, by amendment, be turned into such a one. *Id.*

6. A writ of mandamus on behalf of the people in their sovereign capacity can be awarded only upon the application of the attorney-general, or some district attorney, and the indorsement upon the writ must show that it was issued upon such application. (Code Civ. Pro. § 1993.) *Id.*

7. *It seems*, substantially the same question would have been presented had some other elector been the relator. *Id.*

8. A writ of mandamus to public officers will only be issued to compel the discharge of official duty. *In re People ex rel. Sherwood* v. *Rice.* 391

9. A board of county canvassers, in connection with their returns of the result of an election, sent to the secretary of state a copy of a resolution passed by the board, to the effect that a candidate for the office of state senator, who the returns showed had received a majority of the votes of the county for that office, was not eligible, as appeared by certain affidavits and papers, which were also sent with the copy. Upon application of said candidate an order was granted directing the issuing of a writ of mandamus requiring said secretary to return said papers to the board of county canvassers or the county clerk or to cancel the same of record and forbidding him from permitting them to be brought before the state board of canvassers for their consideration. *Held*, error; that while the state board had no right to consider said papers, no official duty required the secretary of state to return the papers and he violated no official duty in placing them before said board; that while the writ would do no harm, it could accomplish no useful purpose, and should have been denied. *Id.*

10. In proceedings by mandamus to compel a county board of canvassers to reject certain votes cast at a general election for P., a candidate for the office of state senator, these facts appeared: The county clerk, in compliance with said act, caused official ballots to be printed for each election district in the county, one for each of the political parties that had made nominations; all were alike indorsed, as prescribed by the statute, with the designation of the polling place or election district for which the ballots were prepared. In transmitting these ballots to the town clerk, while those of all the parties, but the one of which P. was the candidate for senator, were properly delivered, in nine of the election districts the ballots of that party were transposed, so that those indorsed for one district were sent to another, and were there used and voted, and thus the ballots for that party in each of said districts were indorsed with the number or designation of another district and could be distinguished from those of the other parties. *Held* (ANDREWS, FINCH and PECKHAM, JJ., dissenting),

that an order granting the writ prayed for was proper; that the defective ballots could not be considered as unofficial ballots, as they purported to be official ballots and the condition authorizing the use of unofficial ballots did not exist; and that said ballots could not lawfully be counted. *People ex rel. Nichols* v. *Bd. Co. Canvassers.* 395

11. Any citizen may invoke the aid of the courts to compel the performance by a public officer of a public duty, and so an elector may at least in the case of the death of the candidate interested, make application to the proper tribunal for a mandamus to compel the state board of canvassers to reject and disregard a paper purporting to be a return of a board of canvassers, but which is not properly signed and certified, and does not give the results of a proper legal canvass, and to consider only a proper return. *In re People ex rel. Daley* v. *Rice.* 449

12. Where, upon application for a writ of mandamus requiring the state board of canvassers to disregard the return made by a board of county canvassers, the moving papers alleged, in substance, that the county board illegally canvassed the result of the returns made to it by the inspectors of election and made up its canvass in opposition to said returns, thereby giving a plurality to one candidate when the returns showed that the opposing candidate was elected, and then made a return to the state board, proper and valid on its face, but which gave the results of such illegal canvass, and these allegations were not denied in the opposing papers, *held*, that the court below, in its proper branch, would have the power to command the state canvassers to canvass without regard to such return; also, that in case another return, properly authenticated, containing the result of a legal canvass was subsequently sent, that the state board could canvass it. *Id.*

13. A writ of mandamus may be granted to compel ministerial officers to exercise their functions, where a specific duty has been imposed upon them by law and they refuse to perform it, or do not conform to the law, or when some legal right has been refused by them. *In re People ex rel. Derby* v. *Rice.* 461

14. *It seems*, where a peremptory mandamus is applied for, which by its terms acts as a restraint upon a board of state officers, engaged in the performance or about to perform a duty imposed by statute, and it is sought for to be used as a restraining order or injunction, the limitation upon the granting of such an injunction imposed by the Code of Civil Procedure (§ 605) applies; that is, it "shall not be granted except by the Supreme Court at a General Term." *Id.*

15. Where the sample ballots attached to a return of inspectors of election to the board of county canvassers show that the candidate was correctly named in the ballots, but through mistake or clerical error they are returned in a name differing slightly in the spelling or in some other particular, upon refusal of the said board to send back the return for correction, the candidate is entitled to a mandamus requiring it so to do before canvassing the vote. *People ex rel. Munro* v. *Bd. Co. Canvassers.* 469

16. Where, however, upon application for a mandamus compelling the return for correction of a number of returns so defective, it appeared that the indorsement upon the official ballots used and voted in some of the election districts which contained the name of the candidate upon whose relation the application was made were defective, in that the number of the election district was not stated therein, but instead thereof that of another, district *held* (ANDREWS, FINCH and PECKHAM, JJ., dissenting), that a provision in the order granting the writ requiring the county canvassers, when the erroneous returns were corrected, to proceed and canvass the vote as it appeared on the face of the returns, and declare the result, was error. *Id.*

MANUFACTURING CORPORATIONS.

1. The word "creditors" as used in the provision of the General Manufacturing Act (§ 10, chap. 40, Laws of 1848), making the stockholders of a corporation organized under it liable to the creditors of the company until the whole amount of the capital stock has been paid in and a certificate thereof filed, does not include directors of the corporation, and a director to whom the corporation has become indebted cannot enforce the liability so imposed. *McDowall* v. *Sheehan*. 200

2. This rule applies to one named as a trustee in the certificate of incorporation of the company and who acts as such, although he owns none of its stock; he may legally act as trustee, although not a stockholder. *Id.*

3. The liability imposed by the General Manufacturing Act (§ 10, chap. 40, Laws of 1848) upon stockholders of a company organized thereunder, for a failure to file the proper certificate of payment, upon an increase of its capital stock, attaches only to the increase, and only stockholders holding the increased stock are liable; the provision has no reference to, or effect upon, the original capital and its holders. *Griffeth* v. *Green*. 517

4. A creditor of the corporation, seeking by action to enforce such a liability, must allege and prove facts showing that the conditions of the statute are exactly met by his case; no presumptions or inferences can be indulged in. *Id.*

5. Unless, therefore, the stockholder proceeded against is proved to hold some of the increased stock, he is not brought within the statute. *Id.*

6. The relator, a domestic corporation, organized under the General Manufacturing Act (Chap. 40, Laws of 1848), is engaged in the business of producing electricity and supplying the same to customers for lighting purposes. In proceedings to review by certiorari a decision of the comptroller holding the relator liable to pay taxes and penalties imposed by the act of 1880, providing for the assessment and payment of taxes by certain corporations (Chap. 542, Laws of 1880), and the act of 1881, amending the same (Chap. 361, Laws of 1881), *held*, that it was a manufacturing corporation within the meaning of the provision of said act exempting such corporations, and so was exempt from taxation until the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause. *People ex rel. B. E. M. Co.* v. *Wemple*. 543

7. Where a corporation was organized under the act of 1848 (Chap. 37, Laws of 1848), providing for the incorporation of gas companies, but under the authority given by the act of 1879 (Chap. 512, Laws of 1879), was exclusively engaged in generating and supplying electric currents for the purpose of illumination, *held*, that it was a manufacturing corporation within the meaning of the exemption clause of the act providing for the assessment and taxation of certain corporations (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881), and so was exempt from taxation prior to the passage of the amendatory act of 1889 (Chap. 353, Laws of 1889), which took electric light companies out of the exemption clause; that the fact that the corporation was not organized under the General Manufacturing Act did not affect its character as a manufacturing corporation. *People ex rel. E. E. I. Co.* v. *Wemple*. 664

MARRIED WOMEN.

A married woman may take and hold real property as a joint tenant with her husband, and where, by a deed to herself and her husband, it appears plainly that the intent was to convey to her not merely as a wife, but separately, by virtue of her individual right as joint tenant with him, she has the right to dispose of her interest independent of her husband. *Jooss* v *Fey*. 17

MASTER AND SERVANT.

Railroad tracks are not ballasted for the purpose of making them safe for the employes of the company to walk thereon, but to make them firm and safe for the passage of trains, and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty it owes its employes. *Finneli* v. *D., L. & W. R. R. Co.* 669

MORTGAGE.

1. B., plaintiff's husband, and one W., entered into a contract with defendant for the purchase of a farm by them of him for $5,092.52, "and other stipulations and payments heretofore made and to be performed;" these were not set forth. Indorsed upon the contract, however, was an agreement by the vendees to pay defendant, in addition to said sum, $2,000 and interest, "secured in part" by a deed from B. and wife of certain lots belonging to her, said $2,000 to be paid to McL. prior to the execution of a deed by him to his vendees, and on a sale by McL. of the lots conveyed, the avails, after paying expenses, were to be applied on said $2,000. McL. subsequently conveyed the farm to the wife of W. for a new consideration agreed upon between them, and without the knowledge or consent of B. or his wife. In an action to compel defendant to reconvey said lots to plaintiff, and to pay her the rents received, *held*, that the deed from B. and wife was given as collateral security, and so was in effect a mortgage, and as it appeared that the debt it was given to secure no longer existed, plaintiff, in the absence of other proof, was entitled to the relief sought. *Blazy* v. *McLean.* 44

2. A party who alleges that a deed of real estate, absolute in form, is a mortgage, must show it by very satisfactory evidence. *Wilson* v. *Parshall.* 223

3. In an action for breach of covenant of title in a deed, plaintiff claimed that the deed under which defendant, his grantor, claimed title was in fact a mortgage. The evidence on the part of the plaintiff was to the effect that said deed was executed to pay an indebtedness to a firm of which defendant was a member; that the debt was not to survive the deed, but the firm was to sell the land and after paying the liens thereon, including the debt, to pay over the balance to the grantor. *Held*, that a verdict was properly directed for defendant; that defendant took an absolute title under his deed, his grantor retaining no title or interest in the land as such, but simply an interest in the proceeds to be realized on a sale. *Id.*

4. Upon application for surplus moneys arising on foreclosure sale, it appeared that there were two mortgages which were liens upon the premises sold subsequent to the mortgage foreclosed; the senior one also covered other lands, which the proof showed and the referee found were of value more than sufficient to satisfy the mortgage, and the junior mortgage only covered those premises. *Held*, that the court had no power to displace the prior lien in favor of the junior mortgage, and to compel the owner of the former to resort to the other lands covered by it to obtain payment. *Cannon* v. *Washburn.* 485

5. As to whether, if the owner of the junior mortgage had offered to pay the prior one and demanded an assignment of it, he could have been subrogated to all the rights of its owner as against the other real estate, *quære.* *Id.*

See FORECLOSURE.

MOTIONS AND ORDERS.

The Supreme Court has no inherent power and, in the absence of a statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to

testify on the trial as to the existence or extent of the alleged injury. *McQuigan* v. *D., L. & W. R. R. Co.* 50

MUTUAL BENEFIT ASSOCIATION.

See INSURANCE (LIFE).

MUNICIPAL CORPORATIONS.

See ALBANY (CITY OF).
CANANDAIGUA (VILLAGE OF).
HORNELLSVILLE (CITY OF).
LONG ISLAND CITY.
NEW YORK (CITY OF).
ROCHESTER (CITY OF).
SYRACUSE (CITY OF).

NEGLIGENCE.

1. While a common carrier of passengers, by his contract of transportation, undertakes to protect the passenger against any injury arising from the negligence or willful misconduct of its servants when engaged in the performance of their duties, to warrant a recovery of damages alleged to have been caused by a breach of the undertaking, the negligence or willful misconduct must not only be shown, but it must also appear that the servant was acting at the time in the course of his employment. (EARL and FINCH, JJ., dissenting.) *Mulligan* v. *N. Y. & M. B. R. Co.* 506

2. While a railroad company as a carrier of passengers owes a duty to its passengers and also to its employes of active diligence to guard them from danger, as to a stranger, it owes him no such duty, either to guard him from danger, or in any way to anticipate and so, avoid the consequences of his own negligence. *N. Y., L. E. & W. R. R. Co.* v. *At. Refining Co.* 597

3. In an action to recover damages alleged to have been caused by the negligence of defendant, the following facts appeared: Plaintiff transported for defendant a carload of lumber; it was kept in place upon the car by stakes placed in sockets at the sides, supported by braces nailed to the tops of the stakes and extending across the lumber. The car was delivered to defendant upon a siding alongside of plaintiff's main track. Defendant's agent, in order to unload the lumber, knocked off the cross-pieces, removed a large portion of the lumber, leaving a high narrow pile on the side toward the main track, and without putting back the cross-pieces, left the car over night. During the night a high wind arose and the lumber fell from the car and upon the main track. The engineer of a train approaching thereon, as soon as he perceived the obstruction, applied the air-brakes, but before the train could be stopped, it struck the lumber and the locomotive and cars were broken and damaged. *Held*, that the evidence justified a finding of negligence on the part of defendant; also, that plaintiff was not guilty of contributory negligence; that it owed defendant no duty to unload or superintend the unloading of the car, or to watch and care for it the night after it arrived, and was not bound, as between it and defendant, to anticipate any danger from the lumber after its delivery, but had the right to run its trains on the assumption that defendant would not negligently permit the lumber to be placed or come upon its track. *Id.*

4. Defendant offered to prove that plaintiff kept no watchman at the siding; this was objected to and excluded. *Held*, no error; as plaintiff was not bound to keep a watchman there. *Id.*

5. Defendant offered to prove that the car used for transporting lumber was a flat car and not a lumber car with sides boarded part way; this was rejected. *Held*, no error; as the lumber was safely transported and delivered and fell from the car, not from any imperfection in it, but from the careless manner in which it was left. *Id.*

6. Under the act of 1854 (§ 1, chap. 352, Laws of 1854), "enlarging the powers and duties of the trustees" of the village of Canan-

daigua, the jurisdiction of said trustees with respect to the village streets and sidewalks became absolute, like that of commissioners of highways; by virtue of this enlarged jurisdiction they were invested with general powers and corresponding duties, and the responsibility for their proper performance devolved upon the municipal corporation as such. *McSherry* v. *Village of Canandaigua*. 612

7. Accordingly *held*, that the village was liable for injuries caused by neglect on the part of the trustees to keep a sidewalk in repair. *Id.*

8. The neglect complained of was in not repairing a defective and unsafe grating in a sidewalk, through which plaintiff fell and was injured. It appeared that notice of the dangerous condition of the grating had been given some time prior to the accident to one C., who, it was admitted, was "the street commissioner of the village," being employed, as the evidence showed, to superintend and examine the streets and sidewalks. *Held*, that notice to him was sufficient notice to the corporation. *Id.*

9. Railroad tracks are not ballasted for the purpose of making them safe for the employes of the company to walk thereon, but to make them firm and safe for the passage of trains, and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty it owes its employes. *Finnell* v. *D., L. & W. R. R. Co.* 669

10. Plaintiff, a brakeman in defendant's employ, was upon the tender of an engine backing down slowly upon a side track used for stowing cars and making up trains, for the purpose of coupling it with a car standing on the said track; this was not ballasted like the main track and between some of the ties there was no ballast. Plaintiff was an experienced brakeman acquainted with the locality, and the condition of the track was perfectly visible; he had the entire control of the movements of the engine and could have stopped it by a motion of his hand to the engineer. Plaintiff jumped from the tender into the middle of the track as it approached the car and while slowly walking backward attempting to remove the link in the draw-head of the car, his foot caught between two ties and he was run over and injured. In an action to recover damages, *held*, that there was no negligence on the part of defendant, and that plaintiff was chargeable with contributory negligence. *Id.*

NEW YORK (CITY OF).

In an action to restrain defendants, officials of the city of New York, from removing an awning over the sidewalk in front of plaintiff's place of business in said city, it appeared that said awning was originally erected by plaintiff in compliance with the requirements of an ordinance passed by the common council, and upon the passage of another ordinance changing such requirements, it was, upon the request and with the consent of the city authorities, made to conform therewith. The city authorities subsequently notified plaintiff to remove the obstruction, claiming the right so to do under the Consolidation Act (§ 86, chap. 410, Laws of 1882), which empowers said common council to make ordinances "to prevent encroachments upon and obstructions to the streets * * * and to authorize and require the commissioner of public works to remove the same," declares that "they shall have no power to authorize the placing or continuing of any encroachment or obstruction upon any street or sidewalk," except temporarily (sub. 4), and authorizes them "to regulate the use of streets and sidewalks for signs, sign-posts, awnings, awning-posts * * * and other purposes" (sub. 8). *Held*, that conceding the awning constituted an encroachment on the street and, as to the public, was an obstruction, and so would be included in the general prohibitory clause, the power to regulate awnings gave to the common council the power to authorize their erection and maintenance,

and this power was not taken away by the prohibition; that such a structure was intended to be excepted from said prohibitory clause; and that, therefore, the structure in question was not an illegal obstruction of the street, and while the common council could abate such structures by a repeal or modification of the ordinance, until this was done defendants had no right to interfere therewith. *Hoey* v. *Gilroy*. 132

OFFICE AND OFFICERS.

1. A writ of mandamus to public officers will only be issued to compel the discharge of official duty. *In re People ex rel. Sherwood* v. *Rice*. 391

2. A writ of mandamus may be granted to compel ministerial officers to exercise their functions, where a specific duty has been imposed upon them by law and they refuse to perform it, or do not conform to the law, or when some legal right has been refused by them. *In re People ex rel. Derby* v. *Rice*. 461

3. *It seems*, where a peremptory mandamus is applied for, which by its terms acts as a restraint upon a board of state officers, engaged in the performance or about to perform a duty imposed by statute, and it is sought for to be used as a restraining order or injunction, the limitation upon the granting of such an injunction imposed by the Code of Civil Procedure (§ 605) applies; that is, it "shall not be granted except by the Supreme Court at a General Term." *Id.*

See ELECTION OF OFFICERS.

PARTIES.

1. The Supreme Court has no inherent power and, in the absence of a statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify on the trial as to the existence or extent of the alleged injury. *McQuigan* v. *D., L. & W. R. R. Co.* 50

2. An owner of property in the city of New York abutting on a street, through which an elevated railroad has been built, died after the construction of the road, leaving a will by which he devised the premises to his executors in trust. *Held*, that an action was maintainable by them to recover damages at least to the extent of the diminution of the rental value of the property caused by the road after the death of the testator; that they represented all the rights their testator could have asserted prior to his death and the remedy then existing was not lost or impaired by his death. *Mortimer* v. *Manhattan R. Co.* 81

3. Where the owner of the equity of redemption of mortgaged premises becomes bankrupt and his estate has passed into the hands of an assignee in bankruptcy, to cut off the interest of the latter by a foreclosure of the mortgage, he must be made a party defendant to the foreclosure suit in his representative or official capacity, or it must appear in some way on the face of the proceedings that they relate to or affect the bankrupt's estate; the fact that he was made a party individually is not sufficient, nor is it material that he knew the foreclosure related to lands owned by the bankrupt, and that he had no interest therein save as assignee. *Landon* v. *Townshend*. 166

4. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of the provision of the Code of Civil Procedure (§ 449) which authorizes the trustee of an express trust to sue in his own name without joining with him the party for whose benefit the action is prosecuted. *Duncan* v. *China Mut. Ins. Co.* 237

5. In an action by the owner of property, unlawfully converted, against

one or more of the wrong-doers, it is no defense to show that others were not joined as defendants who are also liable. *Dyett* v. *Hyman*. 351

6. Any citizen may invoke the aid of the courts to compel the performance by a public officer of a public duty, and so an elector may, at least in the case of the death of the candidate interested, make application to the proper tribunal for a mandamus to compel the state board of canvassers to reject and disregard a paper purporting to be a return of a board of canvassers, but which is not properly signed and certified, and does not give the result of a proper legal canvass, and to consider only a proper return. *In re People ex rel. Derby* v. *Rice*. 461

PARTNERSHIP.

1. S. entered into a contract with K. whereby the former agreed to secure the title to a certain piece of land, subject to a purchase-money mortgage, procure a builder's loan, and erect two houses at her own expense thereon; K. to furnish one-half of all the moneys in excess of said loan required to finish the houses. S. agreed when these were completed to convey one of them to K., by warranty deed, subject to the lien of one-half of said mortgages, or, in case the parties should elect to sell, upon a sale of both, to pay K. one-half of the net proceeds. The contract stated it to be the intent of the parties to equally divide any profits which might be realized by the sale of said buildings. S. executed to K. a mortgage on the premises to secure performance of the contract on her part. No sale of the property was made. In an action by one employed by S. to recover for work on the buildings in which it was sought to hold K. responsible as a partner, *held*, that no partnership existed under the contract, as all it contains in relation to a sale or a division of profits is conditional upon the further agreement of the parties; that the transaction might be considered as a purchase by K. of a house under an executory contract of sale. *Demarest* v. *Koch*. 218

2. *It seems*, if the agreement had been one to build the houses, sell and divide the profits, this would not, of itself, establish a partnership. *Id.*

3. In an action against a special partner in a limited partnership to charge him, as a general partner with an indebtedness of the firm, plaintiff claimed that the contribution of the special partner to the capital of the firm was not made in cash, as stated in the certificate and accompanying affidavits filed, but was made by crediting him with an equivalent amount loaned by him to a pre-existing firm, composed of the general partners. To prove this, defendants offered, and were permitted, to give in evidence entries in the books of the old firm, showing loans to it by defendant to the amount of his alleged contribution, and an entry therein of a credit of a similar amount to his capital account with the new firm of the same date as that of the certificate. *Held*, error. *Kohler* v. *Lindenmeyr*. 498

4. *It seems* that, assuming the accounts of the new firm were kept in the same books as those of the old firm, the special partner, in the absence of proof of knowledge of prior entries, could only be charged with entries made after the new firm commenced business. *Id.*

PARTY-WALLS.

1. The term "party-wall" does not necessarily imply an absolutely solid structure, and there is no rule requiring a wall to be such a structure in order to be a party-wall. *Hammann* v. *Jordan*. 61

2. In an action upon a contract, by which defendant agreed to pay half the expense of building a party-wall, it appeared that plaintiff built flues in the wall which encroached upon defendant's half. Plaintiff's counsel called as a witness an architect and asked him if it was customary to build flues in party-walls. This was objected

to; said counsel stated that he desired to show it was a proper thing to put a flue in a party-wall. The court sustained the objection. *Held*, error. *Id.*

3. It was proved that to correct the defect caused by the flues and to give defendant substantially a similar use of the wall as that enjoyed by plaintiff, would cost from $128 to $130. *Held*, that the question as to whether there was such a substantial failure to comply with the agreement as would not authorize a deduction of the cost of curing the defect and grant judgment for the balance, was one of fact for the jury. *Id.*

4. To prove that the encroachment of the flues on defendant's land was not willful, plaintiff, as a witness in his own behalf, was asked whether he intended to have the wall built correctly with regard to the flues. This was objected to and excluded. *Held*, error; that it was competent for plaintiff to show that he did not encroach intentionally upon defendant's premises. *Id.*

5. Defendant claimed and some of his witnesses testified that the wall was not capable of a substantially similar use by him as by plaintiff, and one of them swore that there should have been a four-inch partition line between the flues in order to give defendant the same opportunity of using the wall as plaintiff. There was proof that defendant could obtain such opportunity by expending a certain amount for a chimney breast. A motion for a nonsuit was granted. *Held*, error; that assuming it to be a condition precedent to a recovery that an opportunity for a substantially similar use should exist, the questions as to what would amount to a substantially similar use and whether, after deducting the expense incurred by defendant for a chimney breast, plaintiff should have judgment for the balance of his claim were questions of fact for the jury. *Id.*

6. Also *held*, that if defendant suffered any further damage by reason of plaintiff's encroachment, in the way of being compelled to use some portion of his lot for an additional wall, the amount of such damage would be for the jury to determine, and they should, if the amount is not so great as to show a substantial departure from the contract, deduct the same from the recovery otherwise allowable. *Id.*

7. *It seems* if the amount of damages is of so substantial a nature as to cause the jury to conclude that the encroachment itself, whether innocent or willful, was a substantial departure from the contract, the verdict should be for the defendant. *Id.*

8. It appeared that plaintiff in building the wall left openings for windows. Plaintiff proved that defendant saw these openings when the wall was being built and consented thereto. *Held*, that defendant could not thereafter change his mind and claim that the insertion of the windows was a violation of the agreement. *Id.*

PATENTS (FOR LANDS).

1. A patent from the state is not assailable collaterally, unless void on its face. *B. Mfg. Co.* v. *B. Sons Iron Works.* 155

2. The declaration in the act of 1850 (Chap. 283), that a grant of land under water made to any person other than the owner of the upland shall be void, is to be construed as subject to the settled rule that where evidence *de hors* the patent is requisite to establish its invalidity, it can be avoided only in a direct proceeding to review the action of the commissioners, or by action in equity to vacate the patent. *Id.*

PHYSICIAN AND SURGEON.

The provision of the Code of Civil Procedure (§ 834), prohibiting the disclosure by a physician of any necessary information acquired in a professional capacity, applies only to information the physician

acquires in attending a patient; not to information obtained by him in any other way. *Fisher* v. *Fisher*. 654

PLEADING.

1. The defense of the Statute of Frauds cannot be made available in an action unless pleaded as a defense or presented by the averments of the complaint. *Wells* v. *Monihan*. 161

2. If the plaintiff in an action of ejectment fails to make a tenant in occupation of the premises a party, bringing the action against the landlord only, and the latter joins issue without pleading the non-joinder of the tenant, by his omission to so plead he waives the defect of the non-joinder and as he is a proper party (Code Civ. Pro. § 1503), the action must be tried upon the question of plaintiff's title and right to possession, although a recovery of the land cannot be enforced as against the tenant's occupancy. *Clason* v. *Baldwin*. 183

POSSESSION.

1. Although a tenant at will cannot transfer any of his rights to another and his tenancy ends, if he makes such a transfer and surrenders the occupancy, the person taking it coming in as a trespasser only, yet where such person claims the right of occupancy simply by virtue of his assignment, the recognition and allowance of such claim by the owner of the premises makes the occupant a tenant at will the same as his predecessor, and his occupation continues the possession of the owner. *Landon* v. *Townshend*. 166

2. The building of a fence around land does not alone, as matter of law, necessarily constitute a taking of possession, and where the land is at the time occupied and cultivated by a tenant of one claiming title, and such occupancy continues without being interfered with in any degree and without any recognition by the tenant of any right in the builder of the fence as owner or occupant, and when it appears the fence was built without the knowledge of such claimant, a finding is justified that the building was a mere entry, not a termination of his possession. *Id.*

PRACTICE.

See APPEAL.
MOTIONS AND ORDERS.
PLEADING.
TRIAL.

PRESCRIPTION.

1. Mere provisions in a corporate charter for compensation to the owner of property taken *in invitum* for corporate purposes do not necessarily make an entry by the corporation upon private property in subordination to the private right; such an entry may, notwithstanding the provisions, be adverse and such as may ripen into a prescriptive title. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

2. A right acquired by prescription can never exceed the user in which it had its origin; it is measured by the extent of that use, and that in turn by its purpose, and where essentially different purposes govern separate and successive users, it is as a general rule, impossible to deem the latter identical in any respect or degree with the former. Although a fraction of the right claimed appears to have been common to each user, where no one of them has been of itself and independent of the other for twenty years, and where the fraction was not capable of a separate user, having of itself a real and conceivable purpose, a grant cannot be presumed. *Id.*

3. When, therefore, a trespasser defends by setting up a prescriptive right, if he fails to show such a right to the extent of the user claimed and proved, his defense fails. *Id.*

4. In an action commenced in 1888, to restrain the operation and maintenance of defendants' elevated railroad in a street in the city of

New York in front of plaintiff's premises, and to recover damages for past injuries, these facts appeared: Defendants' predecessor, the W. S. & Y. P. R. Co., in 1867, in pursuance of an act entitled "An act to provide for the construction of an experimental line of railway in the counties of New York and Westchester" (Chap. 489, Laws of 1867), constructed an elevated railroad on the east side of said street, in accordance with the requirements of the act, *i. e.*, a single track, the supporting columns of which were placed along the curbstone line; this road was operated by a cable; a bond conditioned for the payment of damages to property owners was given by said company as required by the act (§ 11). In 1868, having received the certificate of the commissioners required by the act (§§ 3, 5), before the road could be operated, the company commenced the operation. In 1871, steam dummies were substituted as the motive power. In 1872, said company transferred its property and franchises to the defendant, the N. Y. E. R. Co., which transfer was confirmed by the legislature. (Chap. 595, Laws of 1875.) Thereafter turnouts were built at different times and a track on the west side of the street constructed. In 1879, the track on the east side was reconstructed; the columns were removed from the curb line to a line sixteen inches within the sidewalk. Since 1878, the road has been operated by trains drawn by steam engines. Plaintiff became the owner of the premises in question in 1883. The court found that part of the light, air and access of these premises was taken for the use of the railroad in 1868, and has been continuously used ever since for railroad purposes, but refused to find that before this action was commenced, the presumption of a grant of the right to maintain and operate an elevated railroad on the east side of Greenwich street, from the then owner of said property to the defendants' predecessor company, had become conclusive by lapse of time. *Held*, no error; that the original entry by defendants' predecessor was not under a general claim of right, but under a specific legislative grant, beyond which nothing was claimed, and so, at least until the action of the commissioners, it was merely temporary and experimental; that while the possession thereafter was adverse, the changes made in 1879 were material and substantial, injuriously affecting the rights of property owners, and the right thereafter claimed was not identical with the original user; that the fact that some undefined and non-separable part of plaintiff's rights in the street, taken originally, were also taken by the changed structure did not give title to that part, although continuously used for twenty years; that having been so used as an integral element of two different users, it must share the fate of such users, and as neither was continuous for the period required, no prescriptive right had been acquired. *Id.*

5. After the commencement of this action defendants instituted condemnation proceedings to acquire plaintiff's street rights. *Held*, that this was a formal admission, of record, of title in the plaintiff to the rights in question; and that conceeding such an admission would not destroy a prescriptive right already acquired, it was evidence tending to show what the real character of the possession claimed to be adverse in truth was. *Id.*

PRESUMPTION.

1. While proof of an open, exclusive and hostile occupation of premises for twenty years by one who entered under a claim of right and asserting title, to the knowledge and possible injury of the true owner, who during that time was capable of vindicating his right, raises a presumption of title by adverse possession, which if undisputed will require a finding to that effect; the presumption is not conclusive as against other and further facts, but serves only to impose upon the owner the burden of showing the true character of the possession, and where other facts appear tending to justify a conclusion that the possession was not

adverse, the question becomes at least a mixed question of law and fact. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

2. The execution of a bond to a sheriff indemnifying him against damages resulting from an unlawful levy and sale of property made by him, presumptively establishes the liability of the obligors as principals for the original trespass committed by the sheriff. *Dyett* v. *Hyman.* 351

3. The liability imposed by the General Manufacturing Act (§ 10, chap. 40, Laws of 1848) upon stockholders of a company organized thereunder, for a failure to file the proper certificate of payment, has no reference to, or effect upon, the original capital and its holders; the creditor of the corporation, seeking by action to enforce such liability, must allege and prove facts showing that the conditions of the statute are exactly met by his case; no presumptions or inferences can be indulged in. *Griffeth* v. *Green.* 517

PRINCIPAL AND AGENT.

1. A judgment recovered on an indebtedness incurred by defendant because of his failure to pay over rents collected by him as agent is barred by his discharge in bankruptcy. The cause of action in such a case is not a debt created by defendant "while acting in a fiduciary capacity" within the meaning of the provision of the Bankrupt Act, declaring that such a debt shall not be discharged by bankruptcy proceedings. (U. S. R. S. § 5117.) *Mulock* v. *Byrnes.* 23

2. In an action to recover damages for an alleged unlawful arrest and imprisonment, the following facts appeared: Plaintiff, accompanied by a friend, purchased two passenger tickets of defendant's ticket agent, to whom he gave a five dollar bill and received the change with the tickets. A short time before a detective had left with said agent a circular describing three men who, it stated, were engaged in passing counterfeit five dollar bills; the detective told said agent to look out for these men, and if they appeared, to have them arrested. The agent took the bill of plaintiff, supposing him and his companion to be two of the men, and that the bill was counterfeit. After testing it, he sent word to a detective. In consequence of this, a police officer came; the agent, according to the plaintiff's testimony, pointed out the plaintiff, who was sitting at the time outside the station, and directed his arrest; he was thereupon arrested and brought into the ticket office. The agent charged him with having passed a counterfeit bill, which plaintiff denied, but gave the agent another bill in its place. He was then taken to the police court, and, upon examination, was discharged, the first bill having been found to be good. *Held* (EARL and FINCH, JJ., dissenting), that defendant was not liable; that the agent was not acting in the line of his duty so as to make his principal responsible for his acts; that he took the bill supposing it to be counterfeit, and so not in the course of his business, or in the discharge of his duties as agent, but to entrap plaintiff and to aid the police; and that he was not engaged in the discharge of any duty as agent when he pointed out plaintiff and directed his arrest; also, that defendant was not liable to plaintiff for any breach of its contract with him as a passenger, or for neglect of any duty growing out of the relation of passenger and carrier. *Mulligan* v. *N. Y. & R. B. R. Co.* 506

3. Plaintiff, a lawer, was jointly interested with H., who was not a lawyer, in making certain collections for defendant; he also conducted litigations for defendant not connected with the collections. In an action to recover for professional services, defendant claimed that under an arrangement with H. it was agreed that plaintiff's fees were to be contingent upon a recovery. *Held*, the fact that plaintiff and H. were jointly interested in making collections did not authorize the

latter to bind plaintiff by a contract for his professional services in other matters, and it having been found that H. had no authority to make the contract, and that it was not subsequently ratified by plaintiff, he was entitled to recover. *Leavitt* v. *Chase.* 660

PRINCIPAL AND SURETY.

See BOND.

PRIVATE WAY.

Where the owners of a block of land in a city laid out into lots, and sold and conveyed a corner lot, subject to a right of way, fifteen feet in width across the rear thereof from the side street, "for horses, carriages and carts for the private convenience of the owners" of other lots, the way "to be kept open * * * for the uses and purposes aforesaid and no other," *held*, that the grantee and his successors in title were not restricted from building over the way, so long as they left it open the specified width, and to a height sufficient so as not to interfere with the passage of "horses, carriages and carts" through and along it; that they were not required to keep the way open for the purpose of furnishing light and air to buildings on the other lots. *Hollins* v. *Demorest.* 676

PROFESSIONAL COMMUNICATIONS.

The provision of the Code of Civil Procedure (§ 834), prohibiting the disclosure by a physician of any necessary information acquired in a professional capacity, applies only to information the physician acquires in attending a patient; not to information obtained by him in any other way. *Fisher* v. *Fisher.* 654

PROMISE.

See CONTRACT.

PROMISSORY NOTES.

See BILLS, NOTES AND CHECKS.

PROPERTY.

While the right to the use of water as it flows along in a body may become a property right, the water itself is not the subject of fixed appropriation or exclusive dominion, and property therein cannot be acquired either by sovereign or subject, or become the subject of transmission. *Sweet* v. *City of Syracuse.* 316

RAILROAD CORPORATIONS.

1. Plaintiff was one of three trustees appointed by and under a mortgage given by a railroad company to secure certain of its bonds. Said company subsequently executed a lease of its road to plaintiff for the unexpired term of its charter on consideration that he should, among other things, pay the interest upon said bonds and the principal at maturity. This liability plaintiff assumed without any consideration or prospect of personal benefit, but solely in the interest and for the protection of the bondholders, and with the understanding that he should transfer it on the same terms to the E. R. Co.; he, in pursuance of this understanding, leased the road to that company, it agreeing to make the payments and perform the covenants in the lease to plaintiff. The E. R. Co. entered into possession, and after performing its covenants and paying the interest on the bonds for several years, defaulted, became insolvent and its assets went into the hands of a receiver. An action to foreclose said mortgage was brought by said trustees against the mortgagor, plaintiff individually, and the successors of the E. R. Co., which resulted in a judgment for a sale and for a deficiency against the mortgagor and plaintiff. Plaintiff commenced and carried on a series of litigations in his individual name against the E. R. Co., its receiver and others, to compel payment to the bondholders of the unpaid interest. These litigations resulted in the collection of a fund, which was deposited in a bank to the credit of the trustees. In a proceeding to obtain certain allowances for

plaintiff's services and expenses in prosecuting said litigations, *held*, that in so doing, plaintiff was performing a trust duty and was entitled to an allowance for his necessary costs and expenses and to a compensation for his services, at the rate usually awarded to executors and administrators. *Woodruff* v. *N. Y., L. E. & W. R. R. Co.* 27

2. Prior to the coustruction of defendants' elevated railroad in a street in the city of New York, premises abutting on said street, then a vacant lot, were leased to one S. for a term of years, the lessor covenanting that, if during said term the lessee erected upon said lot a building of a character described, she would at the expiration of the term pay the value of the same or grant a renewal for another term. The lessee built upon said premises and thereafter assigned the lease to plaintiff, who took possession and has since then been in possession. After the construction of defendants' road and upon the expiration of the term, the lessor, in accordance with the covenants of the lease, executed to plaintiff a new lease which contained similar provisions as to renewal and the purchase of the building on the premises. In an action to restrain the operation of said road and for damages, the court granted the injunction, unless defendant paid a sum fixed as the value of the easements appropriated or interfered with, and awarded damages for injuries to the property during the six years preceding the commencement of this action. *Held*, no error; that plaintiff's title and right of possession date from the assignment of the lease to him; that the new lease must be regarded as simply a continuation of the prior one; that plaintiff for the purposes of the case was to be construed as the owner of the building and was entitled to recover such sum as represented its diminished rental value caused by the construction and operation of the road. *Kearney* v. *Met. E. R. Co.* 76

3. Also *held*, that plaintiff was entitled to damages for the period during which the premises were leased by him to sub-tenants. *Id.*

4. The distinction pointed out between this case and that of a tenant holding under a lease executed after the construction of the road. *Id.*

5. An owner of property in the city of New York abutting on a street, through which an elevated railroad has been built, without having acquired his easements therein, may recover damages for depreciation in the rental value thereof caused by the construction and operation of the road, while such premises are in the actual possession of tenants occupying under lease from him. *Mortimer* v. *Manhattan R. Co.* 81

6. The owner of such property died after the construction of the road leaving a will by which he devised the premises to his executors in trust. *Held*, that an action was maintainable by them to recover damages at least to the extent of the diminution of the rental value of the property caused by the road after the death of the testator; that they represented all the rights their testator could have asserted prior to his death and the remedy then existing was not lost or impaired by his death. *Id.*

7. An expert in real estate was called as a witness by plaintiffs and asked to give his opinion as to the extent the rental value of the property was diminished per annum by the structure and the passing of trains thereon. This was objected to by defendant's counsel "as improper, irrelevant and immaterial, as assuming that the property has been injured in that way, and as requiring the witness to separate such injury from that due to other causes." The court overruled the objection. *Held*, no error; that the objection made did not present the real objection to the question, *i. e.*, that it sought to substitute the opinion of the witness for the judgment of the jury. *Id.*

8. Upon the trial of an action brought to recover damages for personal injuries, it appeared that

plaintiff was injured by a collision between a street car of one of the defendants in which she was a passenger, and the truck of the other defendant, occuring while the car was crossing and the truck was passing along a street. A witness who had driven trucks for years was asked, and permitted to answer under objection and exception, a question as to within what time and space a loaded truck could be stopped. *Held*, no error; the court, however, stating that the question was barely competent, and that this class of testimony was not to be encouraged. *O'Neil* v. *D. D., E. B. & B. R. R. Co.* 125

9. The trial court refused to charge that the railway company, with its car crossing the street, had the right of way and the superior right in the street which the driver of the truck was bound to respect. *Held*, no error. *Id.*

10. The rule giving to the cars of a street railway corporation the preference and a superior right of way in the street where its tracks are laid, does not apply to streets crossing the railway; at such crossings its cars have no rights superior to those of vehicles moving in the streets crossed. *Id.*

11. In an action commenced in 1888, to restrain the operation and maintenance of defendants' elevated railroad in a street in the city of New York in front of plaintiff's premises and to recover damages for past injuries, these facts appeared: Defendants' predecessor, the W. S. & Y. P. R. Co., in 1867, in pursuance of an act entitled "An act to provide for the construction of an experimental line of railway in the counties of New York and Westchester" (Chap. 489, Laws of 1867), constructed an elevated railroad on the east side of said street, in accordance with the requirements of the act, *i. e.*, a single track, the supporting columns of which were placed along the curbstone line; this road was operated by a cable; a bond conditioned for the payment of damages to property owners was given by said company as required by the act (§ 11). In 1868, having received the certificate of the commissioners required by the act (§§ 3, 5), before the road could be operated, the company commenced the operation. In 1871, steam dummies were substituted as the motive power. In 1872, said company transferred its property and franchises to the defendant, the N. Y. E. R. Co., which transfer was confirmed by the legislature (Chap. 595, Laws of 1875); thereafter, turnouts were built at different times and a track on the west side of the street constructed. In 1879, the track on the east side was reconstructed; the columns were removed from the curb line to a line sixteen inches within the sidewalk. Since 1878, the road has been operated by trains drawn by steam engines. Plaintiff became the owner of the premises in question in 1883. The court found that part of the light, air and access of these premises was taken for the use of the railroad in 1868, and has been continuously used ever since for railroad purposes, but refused to find that before this action was commenced, the presumption of a grant of the right to maintain and operate an elevated railroad on the east side of Greenwich street, from the then owner of said property to the defendants' predecessor company, had become conclusive by lapse of time. *Held*, no error; that the original entry by defendants' predecessor was not under a general claim of right, but under a specific legislative grant, beyond which nothing was claimed, and so, at least until the action of the commissioners, it was merely temporary and experimental; that while the possession thereafter was adverse, the changes made in 1879 were material and substantial, injuriously affecting the rights of property owners, and the right thereafter claimed was not identical with the original user; that the fact that some undefined and non-separable part of plaintiff's rights in the street, taken originally, were also taken by the changed structure did not give title to that part, although continuously used for twenty years;

that having been so used as an integral element of two different users, it must share the fate of such users, and as neither was continuous for the period required, no prescriptive right had been acquired. *Am. B. N. Co.* v. *N. Y. E. R. R. Co.* 252

12. After the commencement of this action defendants instituted condemnation proceedings to acquire plaintiff's street rights. *Held*, that this was a formal admission, of record, of title in the plaintiff to the rights in question; and that conceding such an admission would not destroy a prescriptive right already acquired, it was evidence tending to show what the real character of the possession claimed to be adverse in truth was. *Id.*

13. In awarding an injunction the court fixed as an alternative the payment of a sum specified for the permanent or fee damage; of that amount $1,000 was specifically awarded as damages resulting from the noise caused by the operation of the road. *Held*, error; that the noise could not properly be taken into consideration as an element of fee damage. *Id.*

14. The allowance of alternative damages in such a case is to be deemed a substitute for the ordinary proceedings for condemnation; and so, the amount of the allowance is not wholly in the discretion of the court, but must be for such, and only such, damages as would be given in condemnation proceedings. *Id.*

15. As the elevated roads in said city stand wholly upon lands owned by the municipality, they are liable to abutting owners only for such consequential damages as result from the invasion of property rights; that is, the taking of their easements in the streets—these are, the easement of air, which is impaired by smoke and gases, ashes and cinders; the easement of light, impaired by the structure itself, and the passage of cars thereon; the easement of access, affected by the drippings of oil and water and by the frequent columns. *Id.*

16. The act of 1869 (Chap. 917, Laws of 1869), authorizing the consolidation of certain railroad companies, upon such a consolidation, regards the consolidated company as a new corporation; but where the proposed consolidation is of a domestic corporation and one of another state, the consent of the legislature of that state is requisite to its accomplishment. *People* v. *N. Y., C. & St. L. R. R. Co.* 474

17. While, therefore, *it seems* when two or more domestic corporations are so consolidated, the resulting entity may properly be said to be a corporation "incorporated by and under a general and special law of this state," within the meaning of the "act to tax stock corporations for the privilege of incorporation" (Chap. 143, Laws of 1886), and so subject to the tax imposed by said act, when the consolidation is of a domestic corporation with a corporation of another state whose legislature has sanctioned such a consolidation, as the new corporation owes its existence, not to the state law alone, but to the concurrent legislation of the two states, it is not liable to such tax. *Id.*

18. An elevated railroad in a city street, erected and operated without the consent of the owners of property abutting upon the street, or without having acquired their rights therein, being illegal, such an owner is entitled to recover all damages of every kind caused to him while such road is so illegally maintained and operated. *Messenger* v. *Manhattan R. Co.* 502

19. Where, however, in an action by an abutting owner to restrain the operation of the road, the defendant is permitted to pay the damage to the fee, in estimating those damages the evidence must be confined to what the railroad company is authorized to take or interfere with, to wit, the easements of light, air and access. *Id.*

20. In such an action plaintiff, besides giving evidence as to inter-

ference by defendant with his easements of light, air and access, gave evidence, without objection, of the annoyance suffered from interference with his privacy in the occupancy of his premises, and from noise occasioned by the operation of the railroad, and also that the railroad and its structures intercepted the view of persons passing his premises on the other side of the street. The trial court was not asked to restrict the bearing of this evidence as to such annoyances and the interception of the view to the temporary or rental damage; but was requested to find that there was no easement or other interest appurtenant to plaintiff's premises entitling him to be protected against loss or privacy due to the use of the street, if such use was authorized by the municipality and the state, or which would entitle him to the use of the street for the purpose of having the exterior of his premises conspicuously visible from the other side of the street, or which would authorize him to control the amount of noise made in the street. The court refused so to find. *Held*, that the matters referred to in the request, and the evidence relative thereto, were competent and proper to be considered as bearing upon the rental value, although not competent as bearing upon the fee damages, and as it did not appear that the court took them into consideration in assessing the fee damage, the refusal was not error. *Id.*

21. Plaintiff recovered judgment, assessing his fee damages at $2,000, staying the operation of defendant's road until that sum should be paid, and providing that if defendant removed its station, stairs and approaches, it need pay only $1,500. There was no witness who made precisely such a division of the damages. *Held*, no error; that from the estimates of the witnesses and the facts and circumstances, such an apportionment of the fee damage was justifiable. *Id.*

22. In an action to recover damages for an alleged unlawful arrest and imprisonment, the following facts appeared: Plaintiff, accompanied by a friend, purchased two passenger tickets of defendant's ticket agent, to whom he gave a five dollar bill and received the change with the tickets. A short time before a detective had left with said agent a circular describing three men who, it stated, were engaged in passing counterfeit five dollar bills; the detective told said agent to look out for these men, and, if they appeared, to have them arrested. The agent took the bill of plaintiff, supposing him and his companion to be two of the men, and that the bill was counterfeit. After testing it, he sent word to a detective. In consequence of this, a police officer came; the agent, according to the plaintiff's testimony, pointed out the plaintiff, who was sitting at the time outside the station, and directed his arrest; he was thereupon arrested and brought into the ticket office. The agent charged him with having passed a counterfeit bill, which plaintiff denied, but gave the agent another bill in its place. He was then taken to the police court, and, upon examination, was discharged, the first bill having been found to be good. *Held* (EARL and FINCH, JJ., dissenting), that defendant was not liable; that the agent was not acting in the line of his duty so as to make his principal responsible for his acts; that he took the bill supposing it to be counterfeit, and so not in the course of his business, or in the discharge of his duties as agent, but to entrap plaintiff and to aid the police; and that he was not engaged in the discharge of any duty as agent when he pointed out plaintiff and directed his arrest; also, that defendant was not liable to plaintiff for any breach of its contract with him as a passenger, or neglect of any duty growing out of the relation of passenger and carrier. *Mulligan* v. *N. Y. & R. B. R. Co.* 506

23. Upon foreclosure of a mortgage executed by the C. R. Co., a Kentucky railroad corporation, to secure its bonds which, to the amount of $994,000 were then outstanding, the property was bid in by

defendants under an agreement which provided that they should purchase as trustees, for the benefit of the bondholders, who in pursuance of the agreement had deposited their bonds with a trust company, receiving receipts therefor. In case defendants should fail to sell they were authorized to organize a new corporation, in which event the stock of the new corporation was to be issued to and divided among the holders of the receipts, "in proportion to the number of bonds deposited, for which the receipts were issued, upon the surrender * * * of such receipts." The agreement also provided that defendants "shall have full power and authority to make due provisions, in their discretion, in case of any defect of their express powers, and shall, nevertheless, proceed to carry out the true intent, meaning and purpose of the agreement by conforming as near as may be to the provisions thereof." Also, that "they shall determine all questions that may arise concerning the construction and effect of any provisions" of the agreement, and that their "determination shall be final and conclusive." Having failed to sell within the time designated defendants filed articles of incorporation, which fixed the capital stock of the new corporation at the same amount as the stock of the old company, *i. e.*, $2,000,000; of this amount $994,000 was to be issued to the holders of the receipts in consideration of the conveyance to it of the property; the residue to be disposed by its board of directors. By the laws of Kentucky the purchasers of a railroad at a foreclosure sale are authorized to become incorporated, the corporators to provide in their articles for the issue of paid-up capital stock not to exceed "the original cost of the construction of the railroad and equipment, and such sums as may be necessary to complete the same." Defendants bid in the property at $750,000, and fixed its cost or value at the amount of the bonds, and the new articles provided for the completion of the road. In an action by a bondholder, among other things for an accounting on the part of defendants, *held*, that, in the absence of evidence of bad faith, defendants were not guilty of any violation of the duty they owed the bondholders for which they could be held liable. *White* v. *Wood*. 527

24. A portion of the relief asked for in the complaint and granted by the judgment of the court below was that defendants be restrained from conveying the property to the new corporation. It appeared that the conveyance was made by deed executed and delivered before the commencement of the action. *Held*, that this portion of the judgment was ineffectual for any purpose. *Id.*

25. The judgment also restrained the issuing of the stock of the new company over and above the $994,000. Neither said company nor any of its directors was made parties. *Held*, that this portion of the judgment also was ineffectual. *Id.*

26. Where, in an action to restrain the operation of an elevated railroad in a city street in front of plaintiff's premises, the defendant is allowed to pay the permanent or fee damages in lieu of an injunction, the damages to be allowed are such and only such as would be given in a proceeding for condemnation of lands for railroad purposes. *Bohm* v. *M. E. R. Co.* 576

27. The rule of damages in condemnation proceedings is the full value of the land taken, at the market price, with no deductions for any purpose whatever; and as to the land remaining, if it appears that its value will be depreciated by the proposed use, this depreciation may be awarded as part of the consequential damages suffered. *Id.*

28. An abutting owner, by reason of his situation, has certain rights and privileges in a city street termed easements, which are appurtenant to his land, and are a species of property. The beneficial enjoyment of these easements is interfered with by the erection and

operation of an elevated railroad in the street. This interference is a taking of them *pro tanto*, and entitles the owner to payment therefor, and in addition the damage done his adjoining land. *Id.*

29. As, however, these easements are of no value in and of themselves separated from the land, the real and only damage, if any, suffered by the owner in any particular case is a consequential one, *i. e.*, the effect produced upon his abutting land. *Id.*

30. The question is simply as to the actual result upon the land remaining, *i. e.*, has the actual market value been decreased by the taking, or has it prevented an enhancement in value greater than has actually occurred; and if so to what extent? The damage defendant may be required to pay is the difference between the actual market value of plaintiff's land and what it would have been worth if the railroad had not taken the other property, *i. e.*, the easements. *Id.*

31. Where, therefore, it appears that there has been neither a decrease in value nor any prevention of an increase caused by the railroad, plaintiff is entitled only to nominal damages. *Id.*

32. So, also, *it seems*, where it appears that the plaintiff's abutting land has actually increased in value, unless it is shown that but for the acts of the defendants in taking the easements, it would have grown still more in value, no damage is proved. *Id.*

33. It is not essential to show that plaintiff has received benefits from the taking special and peculiar to his land, not shared in generally by other abutting owners. *Id.*

34. Accordingly *held*, as it appeared by the uncontradicted evidence that there was an increase in value of all the lands abutting on the street, including plaintiff's, since the construction of defendants' road, and that the road largely caused the increase, an allowance of substantial damages was error. *Id.*

35. Also *held*, the fact that other property in the vicinity of plaintiff's and in the side streets had been more than proportionally increased in value by reason of defendant's road, was not material. *Id.*

36. In such an action the uncontradicted evidence showed, and the defendant's counsel requested the court to find, that the existence and operation of the railroad had greatly increased the population of the locality in which plaintiff's property is situated, and has brought traffic into the street, and thereby plaintiff's property has been incidentally benefited, and that there has been a general rise in the value of the real estate along the street, largely attributable to the road. The court refused so to find, and defendants excepted. Defendants also moved for a dismissal of the complaint on the merits, upon the ground, among others, that it appeared plaintiff's property had been benefited by the road, and had, by reason thereof, increased in value since its erection, which motion was denied and exceptions taken. The court found that plaintiff had sustained damage to an amount stated. *Held*, that the exceptions were sufficient to bring up the question as to whether the court had adopted the proper rule of damages. *Id.*

37. While a railroad company as a carrier of passengers owes a duty to its passengers and also to its employes of active diligence to guard them from danger, as to a stranger, it owes him no such duty, either to guard him from danger, or in any way to anticipate and so, avoid the consequences of his own negligence. *N. Y., L. E. & W. R. R. Co.* v. *At. Refining Co.* 597

38. In an action to recover damages alleged to have been caused by the negligence of defendant, the following facts appeared: Plaintiff transported for defendant a carload of lumber; it was kept in place upon the car by stakes placed in sockets at the sides, supported by braces nailed to the tops of the stakes and extending across the

lumber. The car was delivered to defendant upon a siding alongside of plaintiff's main track. Defendant's agent, in order to unload the lumber, knocked off the cross-pieces, removed a large portion of the lumber, leaving a high narrow pile on the side toward the main track, and without putting back the cross-pieces, left the car over night. During the night a high wind arose and the lumber fell from the car and upon the main track. The engineer of a train approaching thereon, as soon as he perceived the obstruction, applied the air-brakes, but before the train could be stopped, it struck the lumber and the locomotive and cars were broken and damaged. *Held*, that the evidence justified a finding of negligence on the part of defendant; also, that plaintiff was not guilty of contributory negligence; that it owed defendant no duty to unload or superintend the unloading of the car, or to watch and care for it the night after it arrived, and was not bound, as between it and defendant, to anticipate any danger from the lumber after its delivery, but had the right to run its trains on the assumption that defendant would not negligently permit the lumber to be placed or come upon its track. *Id.*

39. Defendant offered to prove that plaintiff kept no watchman at the siding; this was objected to and excluded. *Held*, no error; as plaintiff was not bound to keep a watchman there. *Id.*

40. Defendant offered to prove that the car used for transporting lumber was a flat car and not a lumber car with sides boarded part way; this was rejected. *Held*, no error; as the lumber was safely transported and delivered and fell from the car, not from any imperfection in it, but from the careless manner in which it was left. *Id.*

41. Railroad tracks are not ballasted for the purpose of making them safe for the employes of the company to walk thereon, but to make them firm and safe for the passage of trains, and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty it owes its employes. *Finnell v. D., L. & W. R. R. Co.* 669

42. Plaintiff, a brakeman in defendant's employ, was upon the tender of an engine backing down slowly upon a side track used for stowing cars and making up trains, for the purpose of coupling it with a car standing on the side track; this was not ballasted like the main track and between some of the ties there was no ballast. Plaintiff was an experienced brakeman, acquainted with the locality and the condition of the track was perfectly visible; he had the entire control of the movements of the engine and could have stopped it by a motion of his hand to the engineer. Plaintiff jumped from the tender into the middle of the track as it approached the car and while slowly walking backward attempting to remove the link in the draw-head of the car, his foot caught between two ties and he was run over and injured. In an action to recover damages, *held*, that there was no negligence on the part of defendant, and that plaintiff was chargeable with contributory negligence. *Id.*

REAL PROPERTY.

See RIPARIAN OWNER.

RECEIVER.

1. Where a life insurance association, which proposed to issue certificates of membership to those becoming members, with a statement in each certificate that certain sums received thereon should be paid over to a trust company, as a safety fund for the security of the members, to be paid out by the trustee in the manner specified, entered into a contract with the trust company, by which the latter agreed to receive and hold this fund and pay it out in the manner and for the purpose so specified, *held*, that the court had no power, on a voluntary dissolution of the corporation, to order said trustee to pay over the trust fund, deposited in

pursuance of the agreement, to the receiver appointed in said proceedings. *In re H. P. S. F. Assn.* 288

2. The trust company, in pursuance of a Special Term order, made without notice to it, paid over the fund to the receiver. *Held*, that the payment was not voluntary, so far as to preclude the company from moving the court to require the receiver to pay back to it so much of the fund as still remained in his hands. *Id.*

3. The receiver had, in good faith and under the direction of the court, paid out a portion of the fund, before the making of the motion for an order requiring him to pay it back, in the making of which there had been some *laches* on the part of the trust company. *Held*, that he was entitled to be protected in these payments. *Id.*

4. Payments were so made by him to the attorneys in the dissolution proceedings for their fees. *Held*, that an order was proper requiring said attorneys to pay back to the receiver the moneys so received by them, and directing him, upon receipt thereof, to pay them over to the trust company. *Id.*

REFERENCE.

1. P., a merchant doing business in New York, and St. A., a merchant in France, entered into a contract which, after reciting that D., the owner and packer of a certain brand of sardines was willing to give them the monopoly thereof, stated the agreement of the parties to be that they were to advance eighty per cent of cost of each invoice as forwarded from the factories; each to advance one-half; the sardines to be shipped to P. and sold, and the net profits to be divided equally between the parties and D. In pursuance of the contract, sardines were shipped to P., who borrowed of plaintiffs, a firm of bankers, the forty per cent agreed to be advanced by him. P. failed and made an assignment for the benefit of creditors. D. assigned his interest to St. A. Various creditors of P. brought actions against him, and upon attachments issued therein the sardines so sent were levied upon, as were also accounts for sardines sold. In an action to enforce an alleged banker's lien for the advances so made to P., a receiver was appointed, to whom was paid the proceeds of collection of accounts and of sales of the goods. An interlocutory judgment was rendered adjudging that the amount of plaintiff's claim be paid out of the fund, and providing for a reference to ascertain and report as to certain facts, one of which was what portion of the fund in the receiver's hands was realized from the goods shipped to P. under the contract; an appeal was taken from so much of the judgment as directed a reference, which was dismissed. Upon the hearing before the referee it was stipulated by the attorneys for all the parties that the referee "may refer *ad libitum* to the printed case on appeal * * * to ascertain any fact." This contained evidence given before a referee upon whose report the interlocutory judgment was rendered, which was received by him, under objection and exception, tending to show that the whole fund was derived from sales of goods shipped under the contract. It did not appear that any rulings upon the questions so presented were asked for or made by the Special Term on the final hearing. Said court found that all the fund was realized from such sales. *Held*, that the referee had no power to make a decision on these questions, and as the Special Term need not have passed upon them, the exceptions were not available here; that the evidence was properly considered by the trial court, and as it justified the finding, it could not be held here that said finding was without evidence. *Drexel* v. *Pease*. 96

2. Also *held*, that the court had power to direct the reference as provided for in the interlocutory judgment. (Code Civ. Pro. § 1013.) *Id.*

RIPARIAN OWNER.

1 The power to convey lands under water of navigable waters con-

ferred upon the commissioners of the land office (1 R. S. 208, § 67, as amended by chap. 283, Laws of 1850) only authorizes a conveyance to the owners of the adjoining upland; the right or privilege to apply for and receive the conveyance is appurtenant to the upland and vests in the owner thereof and can never exist severed from such ownership. *B. Mfg. Co.* v. *B. Sons Iron Works.* 155

2. Where, therefore, the owner of upland on the Hudson river conveyed the same by deed containing an exception of all the water rights and privileges in the river appertaining to the premises, *held*, that the exception was wholly ineffectual as such, or as precluding a subsequent owner of the upland from claiming title to the land under water under a patent from the state issued to it as such owner. *Id.*

3. The selling or leasing to, and the use by riparian owners or cities, of so much of the waters of streams and lakes appropriated as feeders and reservoirs for the canals as is not needed for the use of the canals, subject to the paramount rights of the state, is not inconsistent with the public use, and an act authorizing it is not in conflict with said provision. *Sweet* v. *City of Syracuse.* 316

ROCHESTER (CITY OF).

1. Under the provisions of the charter of the city of Rochester (§ 40, chap. 14, Laws of 1880), giving to the common council power "to make, modify and repeal ordinances and by-laws to regulate the burial of the dead," that body has power to forbid by ordinance the burial of the dead in lands of a cemetery association within the city limits; and this, although at the time the association took the conveyance of its lands, it was lawful to use them for cemetery purposes. *People ex rel.* v. *Prait.* 68

2. Such an ordinance is a police regulation which the legislature may authorize the common council to pass. *Id.*

3. The consent of said city is not essential to the incorporation of a cemetery association under said act, having for its objects the purchase of lands for the establishment of a cemetery within the city limits. *Id.*

RUGER, WILLIAM C.

Proceedings on death of. 681

SALES.

G., who was insolvent, ordered certain goods of plaintiffs on the 7th of March, 1884, which were received and accepted by him on the sixteenth; on the twenty-second of that month G. failed and made an assignment. Upon the trial of an action to recover possession of the goods, which plaintiff claimed were purchased by G., with knowledge of his insolvency and with the preconceived design not to pay therefor, the court in its charge treated the order as the purchase and charged that the question was the intent of G. at that time. Plaintiff's counsel requested a charge that notwithstanding what G. may have thought when he made the purchase, if when he received the goods he knew or had reasonable cause to know, he could not go on in business, he is equally chargeable with an intent not to pay. This the court refused to charge, saying "the intent must be at the time the contract was made." *Held*, error. *Whitten* v. *Fitzcater.* 626

See VENDOR AND PURCHASER.

SECRETARY OF STATE.

A board of county canvassers, in connection with their returns of the result of an election, sent to the secretary of state a copy of a resolution passed by the board, to the effect that a candidate for the office of state senator, who the returns showed had received a majority of the votes of the county for that office, was not eligible, as

appeared by certain affidavits and papers, which were also sent with the copy. Upon application of said candidate an order was granted directing the issuing of a writ of mandamus requiring said secretary to return said papers to the board of county canvassers or the county clerk or to cancel the same of record and forbidding him from permitting them to be brought before the state board of canvassers for their consideration. *Held*, error; that while the state board had no right to consider said papers, no official duty required the secretary of state to return the papers and he violated no official duty in placing them before said board; that while the writ would do no harm, it could accomplish no useful purpose and should have been denied. *In re People ex rel. Sherwood* v. *Rice*. 391

SHERIFF.

1. The execution of a bond to a sheriff indemnifying him against damages resulting from an unlawful levy and sale of property made by him, presumptively establishes the liability of the obligors as principals for the original trespass committed by the sheriff. *Dyett* v. *Hyman*. 351

2. Those thus connected with the original wrong are jointly and severally liable with the sheriff, and it is no defense, in an action by the owner of the property against one or more of the wrongdoers, to show that others were not joined as defendants who are also liable. *Id.*

3. The provisions of the Code of Civil Procedure (§§ 1421–1423), giving the indemnitors the right to be substituted in such an action as defendants in place of the sheriff, do not have the effect to limit the liability of the indemnitors to the amount they would be liable, in an action by the sheriff, upon their bond, and in no way affect or vary the rights of the injured party; their liability to him rests wholly upon their participation in the original trespass. *Id.*

SHIPPING.

A maritime lien having once attached, cannot be divested, so as to avoid a policy of insurance thereon, without payment, release or some act on the part of the insured. *Cassa Marittima* v. *Phœnix Ins. Co.* 490

SPECIFIC PERFORMANCE.

By the judgment in an action for a partition of the real estate of which the testator died seized, certain real estate was allotted and set off to each of the daughters to be vested, as the decree declared, in her during her life, with remainder in fee to her issue. Subsequently the sole surviving executor executed to each of the daughters a testimonial, as required by the will. M., one of said daughters, died in 1889, leaving a will by which she devised all of her property to plaintiff, her husband, who subsequently entered into a contract to sell and convey a portion of the real estate set apart to her by said decree, by full covenant warranty deed to K., who, upon being tendered such a deed, refused to complete the purchase, alleging that plaintiff did not own the fee. Upon a case submitted under the Code, *held*, that upon the execution and delivery of the certificate, the absolute fee in the lands set apart for her was vested in M.; that this included the lands set apart for her in the partition suit; and so that by her will the fee of the lands in question became vested in plaintiff, and he was entitled to a specific performance of the contract. *Vicle* v. *Keeler*. 190

STATES.

The act of 1869 (Chap. 917, Laws of 1869), authorizing the consolidation of certain railroad companies, upon such a consolidation, regards the consolidated company as a new corporation; but where the proposed consolidation is of a domestic corporation and one of another state, the consent of the legislature of that state is requisite to its accomplishment. *People* v. *N. Y., C. & St. L. R. R. Co.* 474

STATE COMPTROLLER.

—— *Power of as to taxing corporations under the act providing for such taxation (Chap. 542, Laws of 1880, as amended by chap. 361, Laws of 1881).*
See People ex rel. v. *N. Y., C. & St. L. R. R. Co.* 474
People ex rel. v. *Wemple.* 543
People ex rel. v. *Wemple.* 558
People ex rel. v. *Wemple.* 664

STATUTES.

Where a statute contains two distinct provisions; one specific, with precise directions to do a particular thing or permit it to be done; the other general, prohibiting certain acts which, in their general sense, include the particular thing, the prohibitory clause does not control the specific authority, but the latter is to be considered in the nature of an exception to the former. *Hoey* v. *Gilroy.* 132

—— *Chap.* 466, *Laws of* 1877.
—— *Chap.* 328, *Laws of* 1884.
—— *Chap.* 783, *Laws of* 1886.
—— *Chap.* 503, *Laws of* 1887.
See Manning v. *Beck*, 1.
—— § 3, *chap.* 200, *Laws of* 1848.
—— *Chap.* 375, *Laws of* 1849.
See Jones v. *Fey*, 17.
—— *Chap.* 367, *Laws of* 1884.
See Young v. *R. & K. G. L. Co.*, 57.
—— § 10, *chap.* 133, *Laws of* 1847.
—— *Chap.* 280, *Laws of* 1852.
—— *Chap.* 238, *Laws of* 1854.
—— *Chap.* 708, *Laws of* 1869.
—— *Chap.* 154, *Laws of* 1871.
—— § 40, *chap.* 14, *Laws of* 1880.
—— *Chap.* 389, *Laws of* 1889.
See People ex rel. v. *Pratt*, 68.
—— § 2, *tit.* 11, *chap.* 289, *Laws of* 1883.
See In re D. & H. C. Co., 105.
—— § 86, *chap.* 410, *Laws of* 1882.
See Hoey v. *Gilroy*, 132.
—— 1 *R. S.* 208, § 67.
—— *Chap.* 283, *Laws of* 1850.
See Blakslee Mfg. Co. v. *Blakslee's Sons, etc.*, 155.
—— § 10, *Chap.* 40, *Laws of* 1848.
See McDonall v. *Sheehan*, 200.
—— 1 *R. S.* 389, § 5.
See Wilcox v. *City of Rochester*, 247.
—— §§ 3, 5, 11, *chap.* 489, *Laws of* 1867.
—— *Chap.* 595, *Laws of* 1875.
See Am. Bank Note Co. v. *N. Y. E. R. R. Co.*, 252.
—— *Tit.* 10, *chap.* 461, *Laws of* 1871.
—— *Chap.* 383, *Laws of* 1882.
—— § 10, *chap.* 656, *Laws of* 1886.
See In re Trustees Union College, 308.
—— § 18, *chap.* 291, *Laws of* 1889.
—— *Chap.* 314, *Laws of* 1890.
See Sweet v. *City of Syracuse*, 316.
§ 21, *chap.* 262, *Laws of* 1890.
—— *Chap.* 308, *Laws of* 1891.
See In re People ex rel. Sherwood v. *State Bd. of Canvassers*, 360.
—— §§ 17, 21, 29, 31, *chap.* 262, *Laws of* 1890.
—— *Chap.* 296, *Laws of* 1891.
See People ex rel. Nichols v. *Bd. of Co. Canvassers*, 395.
—— §§ 3, 9, *art.* 1, *tit.* 5, *chap.* 130, *Laws of* 1842.
See In re People ex rel. Daley v. *Rice*, 449.
—— *Chap.* 917, *Laws of* 1869.
—— *Chap.* 143, *Laws of* 1886.
See People v. *N. Y., C. & St. L. R. Co.*, 474.
—— § 10, *chap.* 40, *Laws of* 1848.
See Griffeth v. *Greene*, 517.
—— *Chap.* 40, *Laws of* 1848.
—— *Chap.* 542, *Laws of* 1880.
—— *Chap.* 361, *Laws of* 1881.
—— *Chap.* 151, *Laws of* 1882.
—— *Chap.* 501, *Laws of* 1885.
—— *Chap.* 353, *Laws of* 1889.
—— *Chap* 463, *Laws of* 1889.
See People ex rel. v. *Wemple*, 543.
People ex rel. v. *Wemple*, 558.
—— § 1, *chap.* 352, *Laws of* 1854.
See McSherry v. *Village of Canandaigua*, 612.
—— *Chap.* 37, *Laws of* 1848.
—— *Chap.* 512, *Laws of* 1879.
—— *Chap.* 542, *Laws of* 1880.
—— *Chap.* 361, *Laws of* 1881.
—— *Chap.* 353, *Laws of* 1889.
See People ex rel. v. *Wemple*, 664.

STATUTE OF FRAUDS.

The defense of the Statute of Frauds cannot be made available in an action unless pleaded as a defense or presented by the averments of the complaint. *Wells* v. *Monihan.* 161

STOCKHOLDERS.

1. **The word "creditors," as used in the provision of the General Manufacturing Act (§ 10, chap. 40, Laws of 1848), making the stockholders of a corporation organized under it liable to the creditors of**

the company until the whole amount of the capital stock has been paid in and a certificate thereof filed, does not include directors of the corporation, and a director to whom the corporation has become indebted cannot enforce the liability so imposed. *McDowall* v. *Sheehan*. 200

2. This rule applies to one named as a trustee in the certificate of incorporation of the company and who acts as such, although he owns none of its stock; he may legally act as a trustee, although not a stockholder. *Id.*

3. The liability imposed by the General Manufacturing Act (§ 10, chap. 40, Laws of 1848) upon stockholders of a company organized thereunder, for a failure to file the proper certificate of payment, upon an increase of its capital stock, attaches only to the increase, and only stockholders holding the increased stock are liable; the provision has no reference to, or effect upon, the original capital and its holders. *Griffeth* v. *Greene*. 517

4. A creditor of the corporation, seeking by action to enforce such a liability, must allege and prove facts showing that the conditions of the statute are exactly met by his case; no presumptions or inferences can be indulged in. *Id.*

5. Unless, therefore, the stockholder proceeded against is proved to hold some of the increased stock, he is not brought within the statute. *Id.*

STREETS.

See HIGHWAYS.

SUPREME COURT.

The Supreme Court has no inherent power and, in the absence of a statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify on the trial as to the existence or extent of the alleged injury. *McQuigan* v. *D., L. & W. R. R. Co.* 50

——*The Supreme Court has authority over a trust fund with power to grant allowances for costs and expenses, including attorney's fees, to one by whose efforts the fund has been secured or preserved.*

See Woodruff v. *N. Y., L. E. & W. R. R. Co.* 27

SURGEON.

See PHYSICIAN AND SURGEON.

SURROGATE'S COURT.

Under and by the Code of Civil Procedure (§§ 2474, 2475, 2739), the power of a surrogate to permit proof of the claim of an executor, or administrator against his decedent's estate is confined to the occasion of the judicial settlement of his accounts; the surrogate has no jurisdiction to entertain a proceeding solely for the purpose of proving the claim. *In re Ryder*. 640

SYRACUSE (CITY OF).

1. That portion of the provision of the State Constitution, limiting the power of municipalities to create debts (Art. 8, § 11), which declares that the term of bonds issued by certain cities to provide for a water supply, "shall not exceed twenty years," and requires that "a sinking fund shall be created on the issuing of the said bonds, for their redemption," applies only to cities with a population exceeding 100,000. *Street* v. *City of Syracuse*. 316

2. Accordingly *held*, that the provision of the act "to establish and maintain a water department in the city of Syracuse" (§ 18, chap. 291, Laws of 1889, as amended by chap. 314, Laws of 1890), which authorizes the issuing of city bonds, payable July 1, 1920, to defray the expenses of the work, and which makes no provision for a sinking fund, was not violative

of said constitutional provision; it appearing that the city contained less than the specified number of inhabitants. *Id.*

3. Also *held*, that said act does not offend against the constitutional provision (Art. 3, § 16), providing that no local or private bill shall embrace more than one subject and requiring that to be expressed in the title; that under the title given, the legislature could properly insert not only every provision necessary for the organization of a water department, but also provisions conferring power upon that body to supply the city with water. *Id.*

4. Also *held*, that the provision of said act (§ 18), authorizing the city to take water from Skaneateles lake, is not repugnant to the constitutional provision (Art. 7, § 6) which prohibits the legislature from selling, leasing or otherwise disposing of the Erie and certain other canals; it appearing that, while the lake had been appropriated by the state "for a reservoir and feeder to the Erie canal," the water accumulated therein was in excess of that needed for canal purposes; that large quantities were permitted to flow from the lake which were not utilized by the state, much more than is authorized by the act to be taken from the lake for city purposes, and that the act only authorizes the taking of water not required for the use of the canal; that the provision did not sell or authorize the sale, nor did it lease the waters of the lake, but operated merely as a license to the city to take water not needed by the state, subject to the paramount right of the state to resume it at any time. *Id.*

5. Also *held*, that conceding that said provision, as contained in the original act of 1889, was invalid, it did not render the whole act void; and that after the provision was amended in 1890, and thus rendered valid, nothing stood in the way of the full operation of the entire act. *Id.*

6. In an action to restrain said city, its officials and the water board created by said act, from carrying into effect or exercising the powers conferred by it, it was conceded that neither the original act, nor the act amending the same, received the vote of two-thirds of the members elected to each house, and it was claimed that the provision of the act above referred to (§ 18) was violative of the provision of the Constitution (Art. 1, § 9), declaring that the assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating public moneys or property for local or private purposes. *Held*, untenable; that the state never acquired the ownership of the mass of water in the lake, but simply the right to the use of so much as is necessary for canal purposes; and that the condition of the grant to the city in the act was such that no property right or interest which the state owned was transferred, lost or impaired. *Id.*

TAXATION.

See ASSESSMENT AND TAXATION.

TENANTS BY THE ENTIRETY.

See HUSBAND AND WIFE.

TENANTS IN COMMON AND JOINT TENANTS.

1. A married woman may take and hold real property as a joint tenant with her husband, and where by a deed to herself and her husband it appears plainly that the intent was to convey to her not merely as a wife, but separately, by virtue of her individual right as joint tenant with him, she has the right to dispose of her interest independent of her husband. *Jooss* v. *Fey*. 17

2. Certain premises were, in 1882, purchased by F. and his wife, each contributing to the purchase-money from his and her separate estate. The words of the grant were to "the parties of the second part as joint tenants and to their heirs and assigns," and the habendum clause was to them "as

joint tenants and not as tenants in common." The wife subsequently conveyed her interest in the premises to plaintiff. In an action for a partition thereof *held*, that the wife took and held as joint tenant with her husband, not as tenant by the entirety; that she had power to convey, and by her deed plaintiff acquired her interest (§ 3, chap. 200, Laws of 1848, as amended by chap. 375, Laws of 1849); and that the action was maintainable. (Code Civ. Pro. § 1532.) *Id.*

TITLE.

1. By the judgment in an action for a partition of the real estate of which the testator died seized, certain real estate was allotted and set off to each of the daughters to be vested, as the decree declared, in her during her life, with the remainder in fee to her issue. Subsequently the sole surviving executor executed to each of the daughters a testimonial, as required by the will. M., one of said daughters, died in 1889, leaving a will by which she devised all of her property to plaintiff, her husband, who subsequently entered into a contract to sell and convey a portion of the real estate set apart to her by said decree, by full covenant warranty deed to K., who, upon being tendered such a deed, refused to complete the purchase, alleging that plaintiff did not own the fee. Upon a case submitted under the Code, *held*, that upon the execution and delivery of the certificate the absolute fee in the lands set apart for her was vested in M.; that this included the lands set apart for her in the partition suit; and so that by her will the fee of the lands in question became vested in plaintiff, and he was entitled to a specific performance of the contract. *Viele* v. *Keeler*. 190

2. Also *held*, that the rights of M. and her devisee were not affected by the provision of the decree in partition declaring that she had simply a life estate, as that estate was subsequently changed into a fee by the executor's certificate. *Id.*

3. In the absence of an agreement between the parties to a lease of agricultural lands, vesting the title to the hay produced thereon in the lessor, as security for rent, or for any other purpose, the law vests it in the lessee. *Briggs* v. *Austin*. 208

4. In such an action, plaintiff claimed that the deed under which defendant, his grantor, claimed title was in fact a mortgage. The evidence on the part of the plaintiff was to the effect that said deed was executed to pay an indebtedness to a firm of which defendant was a member; that the debt was not to survive the deed, but the firm was to sell the land, and after paying the liens thereon, including the debt, to pay over the balance to the grantor. *Held*, that a verdict was properly directed for defendant; that defendant took an absolute title under his deed, his grantor retaining no title or interest in the land as such, but simply an interest in the proceeds to be realized on a sale. *Wilson* v. *Parshall*. 223

TRADE MARKS.

1. *It seems*, that an imitation of the names, signs or marks under which another conducts a business is a deception practiced upon the public and an injury to the proprietor in the loss of custom and patronage, to redress which the jurisdiction of a court of equity may be invoked. *Munro* v. *Tousey*. 38

2. This rule applies to the publication of books under a particular name; this is the subject of property, and a colorable imitation of the name adopted by one publisher by another engaged in publishing similar books, by which the public may be easily misled into supposing it is the literary article they desired to obtain and read, is an act of deception which injures the publisher who first adopted the name, and which he may call upon a court of equity to redress. *Id.*

3. This power, however, is only to be exercised to prevent fraud and imposition, and to justify the in-

terference of the court there must be some real resemblance in the name and appearance of the publication, such as to deceive a person of ordinary intelligence and prevent him in the ordinary and natural use of his senses from ascertaining the difference. *Id.*

4. Plaintiff was the publisher of a series of detective stories; to designate the series, he had adopted the name of the "Old Sleuth Library," and "Old Sleuth, the Detective," was designated as their author. Defendant published a series of similar stories which he named the "New York Detective Library." This series contained publications by titles, some of which contained the words "Young Sleuth," others "Sleuth." There was a marked difference in the illustrations upon the covers of the two series. *Held*, that an action was not maintainable to restrain defendant from so using the word "Sleuth" in connection with his publication; that the pseudonym "Old Sleuth" was plaintiff's property; but he had no such property rights in the word "Sleuth" as would justify the interference of the court in preventing its use by defendant, in the absence of proof of similarity in the publications, or of other facts tending to show an intent on his part to mislead purchasers. *Id.*

TRESPASS.

1. A covenant of warranty and of quiet enjoyment or against incumbrances in a deed is not broken by a mere trespass not amounting to an eviction, committed without a claim of right on the part of the trespasser. *Horton* v. *Bauer*. 148

2. An accidental trespass, conceded to have been without title or claim of right, upon lands contracted to be conveyed, furnishes no justification for a refusal on the part of the vendee to complete the contract. *Id.*

3. Where an equity court assumes jurisdiction to restrain a continuous trespass, in order to prevent a multiplicity of suits, it may proceed to give full relief, both for the tortious act and the resulting damages. *Lynch* v. *Met. E. R. Co.* 274

4. The execution of a bond to a sheriff indemnifying him against damages resulting from an unlawful levy and sale of property made by him, presumptively establishes the liability of the obligors as principals for the original trespass committed by the sheriff. *Dyett* v. *Hyman*. 351

5. Those thus connected with the original wrong are jointly and severally liable with the sheriff, and it is no defense, in an action by the owner of the property against one or more of the wrongdoers, to show that others were not joined as defendants who are also liable. *Id.*

6. The provisions of the Code of Civil Procedure (§§ 1421–1423), giving the indemnitors the right to be substituted in such an action as defendants in place of the sheriff, do not have the effect to limit the liability of the indemnitors to the amount they would be liable in an action by the sheriff, upon their bond, and in no way affect or vary the rights of the injured party; their liability to him rests wholly upon their participation in the original trespass. *Id.*

7. Parties who are jointly and severally liable for an unlawful taking of property cannot, by any arrangement between themselves, prejudice the rights of the owner. *Id.*

8. A cause of action against a wrongdoer is a right of property, and can be taken from him only by process of law. *Id.*

TRIAL.

1. In an action upon a contract, by which defendant agreed to pay half the expense of building a party-wall, it appeared that plaintiff built flues in the wall which encroached upon defendant's half; it was proved that to correct the defect caused by the flues and to

give defendant substantially a similar use of the wall as that enjoyed by plaintiff, would cost from $128 to $130. *Held*, that the question as to whether there was such a substantial failure to comply with the agreement as would not authorize a deduction of the cost of curing the defect and grant judgment for the balance, was one of fact for the jury. *Hammann* v. *Jordan.* 61

2. Defendant claimed and some of his witnesses testified that the wall was not capable of a substantially similar use by him as by plaintiff, and one of them swore that there should have been a four-inch partition line between the flues in order to give defendant the same opportunity of using the wall as plaintiff. There was proof that defendant could obtain such opportunity by expending a certain amount for a chimney breast. A motion for a nonsuit was granted. *Held*, error; that assuming it to be a condition precedent to a recovery that an opportunity for a substantially similar use should exist, the questions as to what would amount to a substantially similar use and whether, after deducting the expense incurred by defendant for a chimney breast, plaintiff should have judgment for the balance of his claim, were questions of fact for the jury. *Id.*

3. Also *held*, that if defendant suffered any further damage by reason of plaintiff's encroachment, in the way of being compelled to use some portion of his lot for an additional wall, the amount of such damage would be for the jury to determine, and they should, if the amount is not so great as to show a substantial departure from the contract, deduct the same from the recovery otherwise allowable. *Id.*

4. *It seems* if the amount of damages is of so substantial a nature as to cause the jury to conclude that the encroachment itself, whether innocent or willful, was a substantial departure from the contract, the verdict should be for the defendant. *Id.*

5. In an action by an abutting owner to recover damages occasioned by the operation of the elevated railroad in a city street, an expert in real estate was called as a witness by plaintiffs and asked to give his opinion as to the extent the rental value of the property was diminished per annum by the structure and the passing of trains thereon. This was objected to by defendant's counsel "as improper, irrelevant and immaterial, as assuming that the property has been injured in that way, and as requiring the witness to separate such injury from that due to other causes." The court overruled the objection. *Held*, no error; that the objection made did not present the real objection to the question, *i. e.*, that it sought to substitute the opinion of the witness for the judgment of the jury. *Mortimer* v. *Manhattan R. Co.* 81

6. P., a merchant doing business in New York, and St. A., a merchant in France, entered into a contract which, after reciting that D., the owner and packer of a certain brand of sardines was willing to give them the monopoly thereof, stated the agreement of the parties to be that they were to advance eighty per cent of the cost of each invoice as forwarded from the factories; each to advance one-half; the sardines to be shipped to P. and sold, and the net profits to be divided equally between the parties and D. In pursuance of the contract, sardines were shipped to P., who borrowed of plaintiffs, a firm of bankers, the forty per cent agreed to be advanced by him. P. failed and made an assignment for the benefit of creditors. D. assigned his interest to St. A. Various creditors of P. brought actions against him, and upon attachments issued therein the sardines so sent were levied upon, as were also accounts for sardines sold. In an action to enforce an alleged banker's lien for the advances so made to P., a receiver was appointed, to whom was paid the proceeds of collection of accounts and of sales of the goods. The complaint alleged and the answers admitted that St. A. claimed an interest in the fund.

His answers set forth the facts of the transaction and characterized P. as his selling agent, instead of a party to the joint enterprise. The trial court disregarded the variance. *Held*, that no error was committed in this respect which would warrant an interference with the judgment. *Drexel* v. *Pease*. 96

7. An interlocutory judgment was rendered adjudging that the amount of plaintiff's claim be paid out of the fund, and providing for a reference to ascertain and report as to certain facts, one of which was what portion of the fund in the receiver's hands was realized from the goods shipped to P. under the contract; an appeal was taken from so much of the judgment as directed a reference, which was dismissed. Upon the hearing before the referee it was stipulated by the attorneys for all the parties that the referee "may refer *ad libitum* to the printed case on appeal * * * to ascertain any fact. This contained evidence given before a referee upon whose report the interlocutory judgment was rendered, which was received by him, under objection and exception, tending to show that the whole fund was derived from sales of goods shipped under the contract. It did not appear that any rulings upon the questions so presented were asked for or made by the Special Term on the final hearing. Said court found that all the fund was realized from such sales. *Held*, that the referee had no power to make a decision on these questions, and as the Special Term need not have passed upon them, the exceptions were not available here; that the evidence was properly considered by the trial court, and as it justified the finding, it could not be held here that said finding was without evidence. *Id.*

8. Upon the trial of an action brought to recover damages for personal injuries, it appeared that plaintiff was injured by a collision between a street car of one of the defendants in which she was a passenger, and the truck of the other defendant, occurring while the car was crossing and the truck was passing along the street. The trial court refused to charge that the railway company, with its car crossing the street, had the right of way and the superior right in the street which the driver of the truck was bound to respect. *Held*, no error. *O'Neil* v. *D. D., E. B. & B. R. R. Co.* 125

9. Before the court charged the jury, requests to charge were made by counsel for the respective parties, which it charged or refused. Counsel for the truck owner then made further requests, which were charged. Counsel for the railway company made a further request, which was acceded to. Counsel for the truck owner then made a further request, which the court declined to hear or receive. *Held*, no error. *Id.*

10. *It seems* that counsel may not unreasonably prolong a trial by the examination of witnesses, or by debates to the court or the jury, or by innumerable and interminable requests to charge. *Id.*

11. If the plaintiff in an action of ejectment fails to make a tenant in occupation of the premises a party, bringing the action against the landlord only, and the latter joins issue without pleading the non-joinder of the tenant, by his omission to so plead he waives the defect of the non-joinder, and as he is a proper party (Code Civ. Pro. § 1503), the action must be tried upon the question of plaintiff's title and right to possession, although a recovery of the land cannot be enforced as against the tenant's occupancy. *Clason* v. *Baldwin*. 183

12. The provision of the State Constitution declaring that: "The trial by jury in all cases in which it has heretofore been used, shall remain inviolate forever" (§ 2, art. 1), does not apply to the trial of issues of fact in an equity action; and this, although as incidental to the equitable relief sought, a money judgment is asked for and issues of fact are presented which might be the basis of an action at law. *Lynch* v. *Met. E. R. Co.* 274

13. In an action to restrain defendants from maintaining and operating their road in a street in front of plaintiff's premises in the city of New York, the complaint alleged the plaintiff's title and ownership, his rights in and to the street in front of his premises, the construction of defendants' road and the operation of trains over it, the failure of defendants to acquire or make compensation for the easements taken, the injuries sustained, that they will be constant and continuous, and that to prevent a multiplicity of suits, to protect against irreparable damages and to afford complete relief, the plaintiff was compelled to seek the equitable interference of the court. The prayer for judgment included a demand for the amount of loss and damage which might be ascertained to have been already sustained. When the case came on for trial defendants' counsel moved for a trial of the claim for past damages by jury; the motion was denied. *Held*, no error; that the demand for past damages did not have the effect to set it up as an independent cause of action, but was simply a demand that the court if it adjudged plaintiff entitled to the equitable relief prayed for, and having acquired entire jurisdiction of the action should, as an incident thereto, assess the damages which appear to have been sustained down to the trial; and that the right to a separate trial by jury of this issue was not within the purview of the constitutional guaranty. *Id.*

14. *It seems* that if defendants deemed themselves entitled to and desired a trial by jury of some issue of fact in the action, the proper course for them would have been to have applied upon notice for such a trial (Code Civ. Pro. § 970.) *Id.*

15. In an action by an abutting owner to restrain the operation of an elevated railroad in a city street plaintiff, besides giving evidence as to interference by defendant with his easements of light, air and access, gave evidence, without objection of the annoyance suffered from interference with his privacy in the occupancy of his premises, and from noise occasioned by the operation of the railroad, and also that the railroad and its structures intercepted the view of persons passing his premises on the other side of the street. The trial court was not asked to restrict the hearing of this evidence as to such annoyances and the interception of the view to the temporary or rental damage; but was requested to find that there was no easement or other interest appurtenant to plaintiff's premises entitling him to be protected against loss or privacy due to the use of the street, if such use was authorized by the municipality and the state, or which would entitle him to the use of the street for the purpose of having the exterior of his premises conspicuously visible from the other side of the street, or which would authorize him to control the amount of noise made in the street. The court refused to so find. *Held*, that the matters referred to in the request, and the evidence relative thereto, were competent and proper to be considered as bearing upon the rental value, although not competent as bearing upon the fee damages, and as it did not appear that the court took them into consideration in assessing the fee damage, the refusal was not error. *Messenger* v. *Manhattan R. Co* 502

16. Plaintiff recovered judgment, assessing his fee damages at $2,000, staying the operation of defendant's road until that sum should be paid, and providing that if defendant removed its station, stairs and approaches, it need pay only $1,500. There was no witness who made precisely such a division of the damages. *Held*, no error; that from the estimates of the witnesses and the facts and circumstances, such an apportionment of the fee damage was justifiable. *Id.*

17. In an action to restrain defendant from tearing down a wall erected upon his land by plaintiff under an alleged parol license, it appeared that the parties owned adjoining city lots. In grading his lot plaintiff raised an embank-

ment along the line between the two lots. Defendant thereafter, in grading his lot, excavated the earth up to said line and to the embankment. In an interview between the parties plaintiff requested defendant to sell him two feet of his land to build a wall upon. Defendant declined at the time, but subsequently wrote plaintiff that he had decided to give him the two feet asked for. Plaintiff thereupon built the wall, and his attorney demanded a deed of the two feet. Defendant declined to execute a deed on the ground that he had not agreed to give a deed and that the wall was not built according to the understanding, and gave notice that he intended to tear it down. The trial judge decided in favor of plaintiff, on the ground that the license when executed became irrevocable. *Held*, error. *Crosdale* v. *Lanigan*. 604

18. Where a trial court makes an erroneous charge, a correction, to cure the error, must be clear and not left to be argued out of another proposition dealing with a different question. *Whitten* v. *Fitzwater*. 626

19. G., who was insolvent, ordered certain goods of plaintiffs on the 7th of March, 1884, which were received and accepted by him on the sixteenth; on the twenty-second of that month G. failed and made an assignment. Upon the trial of an action to recover possession of the goods, which plaintiff claimed were purchased by G., with knowledge of his insolvency and with the preconceived design not to pay therefor, the court in its charge treated the order as the purchase and charged that the question was the intent of G. at that time. Plaintiff's counsel requested a charge that notwithstanding what G. may have thought when he made the purchase, if when he received the goods he knew or had reasonable cause to know, he could not go on in business, he is equally chargeable with an intent not to pay. This the court refused to charge, saying "the intent must be at the time the contract was made." *Held*, error. *Id.*

TRUSTS AND TRUSTEES.

1. In the disposition of a trust estate, the trust fund must bear the expenses of its administration, and this, although no provision therefor is made in the instrument of trust. *Woodruff* v. *N. Y., L. E. & W. R. R. Co.* 27

2. Trustees and, *it seems*, others acting in a fiduciary character, are entitled to reasonable allowances for costs and expenses incurred in the course of the performance of their duties, out of a fund which has been secured or protected by their efforts. This right includes all reasonable fees paid attorneys and counsel for services in litigations successfully prosecuted for the benefit of the fund. *Id.*

3. So also, when one of many persons having a common interest in a trust fund, at his own expense, takes proper proceedings to secure it, or save it from destruction and restore it to the purposes of the trust, he is entitled to an allowance for his services and to reimbursement out of the fund from those who accept the benefit of his efforts. *Id.*

4. The Supreme Court has authority over such a fund, with power to make distribution and to grant allowances to the one by whose efforts it has been secured or preserved. *Id.*

5. Where the amount and value of such expenses and services have been determined by the court below upon contradictory evidence, this court has no power to review its conclusions. *Id.*

6. Plaintiff was one of three trustees appointed by and under a mortgage given by a railroad company to secure certain of its bonds. Said company subsequently executed a lease of its road to plaintiff for the unexpired term of its charter on consideration that he, among other things, pay the interest upon said bonds and the

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principal at maturity. This liability plaintiff assumed without any consideration or prospect of personal benefit, but solely in the interest and for the protection of the bondholders, and with the understanding that he should transfer it on the same terms to the E. R. Co.; he, in pursuance of this understanding, leased the road to that company, it agreeing to make the payments and perform the covenants in the lease to plaintiff. The E. R. Co. entered into possession, and after performing its covenants and paying the interest on the bonds for several years, defaulted, became insolvent and its assets went into the hands of a receiver. An action to foreclose said mortgage was brought by said trustees against the mortgagor, plaintiff individually, and the successors of the E. R. Co., which resulted in a judgment for a sale and for a deficiency against the mortgagor and plaintiff. Plaintiff commenced and carried on a series of litigations in his individual name against the E. R. Co., its receiver and others, to compel payment to bondholders of the unpaid interest. These litigations resulted in the collection of a fund, which was deposited in a bank to the credit of the trustees. In a proceeding to obtain certain allowances for plaintiff's services and expenses in prosecuting said litigations, *held*, that in so doing, plaintiff was performing a trust duty and was entitled to an allowance for his necessary costs and expenses and to a compensation for his services at the rate usually awarded to executors and administrators. *Id.*

7. An owner of property in the city of New York abutting on a street, through which an elevated railroad had been built, died after the construction of the road, leaving a will by which he devised the premises to his executors in trust. *Held*, that an action was maintainable by them to recover damages at least to the extent of the diminution of the rental value of the property caused by the road after the death of the testator; that they represented all the rights their testator could have asserted prior to his death and the remedy then existing was not lost or impaired by his death. *Mortimer* v. *Manhattan R. Co.* 81

8. A person with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of the provision of the Code of Civil Procedure (§ 449) which authorizes the trustee of an express trust to sue in his own name without joining with him the party for whose benefit the action is prosecuted. *Duncan* v. *China Mut. Ins. Co.* 237

9. While the court has power, in proceedings for the voluntary dissolution of a corporation, to decree a distribution of its funds among those entitled thereto, it may not take from a trustee funds placed in his hands by the corporation for a specific purpose, pursuant to a contract obligation, and itself distribute them through its receiver instead of through the trustee; the latter is, notwithstanding the dissolution, entitled to the possession of the trust fund, and the authority of the court is limited to compelling the trustee to distribute the fund, as provided for by the contract, and under the supervision and orders of the court. *In re H. P. S. F. Assn.* 288

10. Where, therefore, a life insurance association, which proposed to issue certificates of membership to those becoming members, with a statement in each certificate that certain sums received thereon should be paid over to a trust company, as a safety fund for the security of the members, to be paid out by the trustee in the manner specified, entered into a contract with the trust company, by which the latter agreed to receive and hold this fund and pay it out in the manner and for the purposes so specified, *held*, that the court had no power, on a voluntary dissolution of the corporation, to order said trustee to pay over the trust fund, deposited in pursuance of the agreement, to the receiver appointed in said proceedings. *Id.*

11. Also *held*, that the question was not affected by the fact that the agreement stated that the fund belonged to the association, subject to the execution of the trust. *Id.*

12. The trust company, in pursuance of a Special Term order, made without notice to it, paid over the fund to the receiver. *Held*, that the payment was not voluntary, so far as to preclude the company from moving the court to require the receiver to pay back to it so much of the fund as still remained in his hands. *Id.*

13. The receiver had, in good faith and under the direction of the court, paid out a portion of the fund, before the making of the motion for an order requiring him to pay it back, in the making of which there had been some *laches* on the part of the trust company. *Held*, that he was entitled to be protected in these payments. *Id.*

14. Payments were so made by him to the attorneys in the dissolution proceedings for their fees. *Held*, that an order was proper requiring said attorneys to pay back to the receiver the moneys so received by them, and directing him, upon receipt thereof, to pay them over to the trust company. *Id.*

15. Upon foreclosure of a mortgage executed by the C. R. Co., a Kentucky railroad corporation, to secure its bonds, which to the amount of $994,000 were then outstanding, the property was bid in by defendants under an agreement which provided that they should purchase as trustees, for the benefit of the bondholders, who in pursuance of the agreement had deposited their bonds with a trust company, receiving receipts therefor. In case defendants should fail to sell, they were authorized to organize a new corporation, in which event the stock of the new corporation was to be issued to and divided among the holders of the receipts, "in proportion to the number of bonds deposited, for which the receipts were issued, upon the surrender * * * of such receipts." The agreement also provided that defendants "shall have full power and authority to make due provisions, in their discretion, in case of any defect of their express powers, and shall, nevertheless, proceed to carry out the true intent, meaning and purpose of the agreement by conforming, as near as may be, to the provisions thereof." Also, that "they shall determine all questions that may arise concerning the construction and effect of any provisions" of the agreement, and that their "determination shall be final and conclusive." Having failed to sell within the time designated, defendants filed articles of incorporation, which fixed the capital stock of the new corporation at the same amount as the stock of the old company, *i. e.*, $2,000,000; of this amount, $994,000 was to be issued to the holders of the receipts in consideration of the conveyance to it of the property; the residue to be disposed by its board of directors. By the laws of Kentucky the purchasers of a railroad at a foreclosure sale are authorized to become incorporated, the corporators to provide in their articles for the issue of paid-up capital stock not to exceed "the original cost of the construction of the railroad and equipment, and such sums as may be necessary to complete the same." Defendants bid in the property at $750,000, and fixed its cost or value at the amount of the bonds, and the new articles provided for the completion of the road. In an action by a bondholder, among other things, for an accounting on the part of defendants, *held* that, in the absence of evidence of bad faith, defendants were not guilty of any violation of the duty they owed the bondholders for which they could be held liable. *White* v. *Wood*. 527

16. A portion of the relief asked for in the complaint and granted by the judgment of the court below, was that defendants be restrained from conveying the property to the new corporation. It appeared that the conveyance was made by deed executed and delivered before the commencement of the

action. *Held*, that this portion of the judgment was ineffectual for any purpose. *Id.*

17. The judgment also restrained the issuing of the stock of the new company over and above $994,000. Neither said company nor any of its directors was made parties. *Held*, that this portion of the judgment also was ineffectual. *Id.*

VENDOR AND PURCHASER.

1. An accidental trespass, conceded to have been without title or claim of right, upon lands contracted to be conveyed, furnishes no justification for a refusal on the part of the vendee to complete the contract. *Horton* v. *Bauer*. 148

2. Plaintiff contracted to sell and convey to defendant B. certain premises, he to take a mortgage thereon to secure part of the purchase-money. B. assigned the contract to defendant C., to whom plaintiff conveyed the premises, and C. subsequently conveyed them to B. At the time of the conveyance a street railroad encroached upon the premises. This trespass was unintentional and grew out of uncertainty as to the lines of an unopened street. B. required and plaintiff executed to him in connection with the deed a covenant to have the railroad company within thirty days execute as lessee a lease of the land occupied by its tracks or to have them removed; also to indemnify B. "from all loss or damage which may arise from the encroachment of the tracks, * * * including loss of profits in any future transaction in respect to said lands." Negotiations were immediately opened with the company for a lease, which were delayed beyond the thirty days, the limitation of time, however, having been waived by B. The tracks were subsequently removed, but before this B. contracted to sell said lands at an advance of $36,000. In an action to foreclose the mortgage, defendant set up as a counterclaim the covenant and the contract of sale, alleging that his vendee upon a tender of a deed, with covenants of warranty, of quiet enjoyment and against incumbrances, refused to perform because of the encroachment. B. claimed to recover the $36,000 as damages for breach of the covenant. *Held*, that the burden was upon B. of showing that the loss of profits was caused by the encroachment; that as this was simply a trespass not amounting to an eviction, and under no claim of right, the covenants in B.'s deed were not broken thereby, and it did not excuse his vendee from performance of his contract, and so he failed to show a loss occasioned thereby; also that B. could have removed or ended the encroachment. *Id.*

3. B. offered to assign his contract to plaintiff to enable the latter to enforce it. *Held*, that the offer was properly rejected; that the duty of enforcing the contract or of showing that the enforcement was impossible rested upon B. and he could not impose it upon plaintiff; also that B. was bound fairly to prevent or lessen his loss before calling upon plaintiff for indemnity. *Id.*

4. B. testified on the trial that his vendee was his intimate friend; that he never told him of the encroachment or the existing situation in reference to its removal; that the vendee on discovering it refused to perform on this sole ground. *Held*, that this testimony and the circumstances attending the transaction justified a finding that the contract of sale was a fictitious one, not made in good faith, but solely for the purpose of furnishing a basis for damages against plaintiff, and also a finding that B. had sustained, not real or actual, but only nominal damages. *Id.*

5. S. entered into a contract with K. whereby the former agreed to secure the title to a certain piece of land, subject to a purchase-money mortgage, procure a builder's loan, and erect two houses at her own expense thereon; K. to furnish one-half of all moneys in excess of said loan required to finish

the houses. S. agreed when these were completed to convey one of them to K., by warranty deed, subject to the lien of one-half of said mortgages, or, in case the parties should elect to sell, upon a sale of both, to pay K. one-half of the net proceeds. The contract stated it to be the intent of the parties to equally divide any profits which might be realized by the sale of said buildings. S. executed to K. a mortgage on the premises to secure performance of the contract on her part. No sale of the property was made. In an action by one employed by S. to recover for work on the buildings, in which it was sought to hold K. responsible as a partner, *held*, that no partnership existed under the contract, as all it contains in relation to a sale or division of profits is conditional upon the further agreement of the parties; that the transaction might be considered as a purchase by K. of a house under an executory contract of sale. *Demarest* v. *Koch*. 218

See SALES.

VILLAGES.

See CANANDAIGUA (VILLAGE OF).

WAIVER.

1. If the plaintiff in an action of ejectment fails to make a tenant in occupation of the premises a party, bringing the action against the landlord only, and the latter joins issue without pleading the non-joinder of the tenant, by his omission to so plead he waives the defect of the non-joinder and as he is a proper party (Code Civ. Pro. § 1503), the action must be tried upon the question of plaintiff's title and right to possession, although a recovery of the land cannot be enforced as against the tenant's occupancy. *Olason* v. *Baldwin*. 183

2. A policy of marine insurance was issued by defendant, to plaintiff, "on account of whom it may concern, in case of loss, to be paid" to a corporation of which plaintiff was general manager and owner of nearly all of its stock. The vessel insured belonged to said corporation. The policy contained a stipulation that a change of interest in the vessel should not affect the validity of the policy. Plaintiff thereafter, in behalf of his company, sold the vessel insured to another corporation. Part of the purchase-price was secured by a mortgage on the vessel running to plaintiff, and by the contract of sale it was agreed that the insurance should stand and be held for the benefit of all interests until other policies could be obtained. The vessel insured was lost during the life of the policy which remained in plaintiff's possession; his company orally assigned to him its claims thereunder and the purchasing corporation, instructed him to collect the insurance. In an action brought by the plaintiff in his own name upon the policy, the complaint set forth all the facts showing his connection with the transaction, the sale of the vessel and the title to the same, the execution of the mortgage to him and the agreement in regard to the insurance, and that at the time of the loss he held the policy under an agreement between all the parties interested that it should stand in his hands as an indemnity to him in case of loss. No objection was made to the proofs of loss before the commencement of the action and no point was raised as to defect of parties plaintiff either by demurrer or answer. *Held*, that the objection as to non-joinder of parties plaintiff was waived (Code Civ. Pro. §§ 488, 498, 499). *Duncan* v. *China Mut. Ins. Co.* 237

WATER COURSES.

1. The power to convey lands under water of navigable waters conferred upon the commissioners of the land office (1 R. S. 208, § 67, as amended by chap. 283, Laws of 1850) only authorizes a conveyance to the owners of the adjoining upland; the right or privilege to apply for and receive the conveyance is appurtenant to the upland and vests in the owner thereof and can never exist severed from such own-

ership. *B. Mfg. Co.* v. *B. Sons Iron Works.* 155

2. While the right to the use of water as it flows along in a body may become a property right, the water itself is not the subject of fixed appropriation or exclusive dominion, and property therein cannot be acquired either by sovereign or subject, or become the subject of transmission. *Sweet* v. *City of Syracuse.* 316

WAY.

See HIGHWAYS.
PRIVATE WAY.

WILLS.

1. A codicil will not operate as a revocation of previous testamentary provisions, beyond the clear import of its language, and it never so operates on the ground of repugnancy, save when necessary, and only so far as necessary, to give the codicil effect. *Viele* v. *Keeler.* 190

2. An expressed intention to make a change in a will in one particular negatives by implication an intention to alter it in any other respect. *Id.*

3. The will of T., executed in 1836, gave three-fourths of his residuary estate to his executors, in trust, to be held in three equal and separate parts, one for each of his three daughters until her arrival at the age of twenty-one, after that time the daughter to care for the realty and keep invested the personalty set apart for her share and have the rents and income accruing therefrom, "independent of her husband, if married," during life, the same to pass upon her death to her surviving children. The will then provided that in case either of the daughters married "and her husband be found capable and prudent in the management of property, and shall treat her and her family with kindness," and the executors shall first give to her "a written testimonial to that effect," she shall have in addition to the life estate an absolute property in and control over the share apportioned to her. By a codicil it was provided that each of the daughters, after her arrival of age, should have and hold the property apportioned to her "according to the several clauses and directions" of the will, during her life, if married, free from the control of her husband, and as if she "were *femme sole*," with remainder to her children. *Held*, that the codicil did not revoke the provisions of the will conferring upon the executors power, by giving the testimonial, to convert the life estate into an absolute title. *Id.*

4. The words of the gift to the executors were "unto my said executor or executors who shall consent to act or may survive." *Held*, that upon the death of all of the executors but one, the survivor had power to execute the prescribed testimonial. *Id.*

5. By a judgment in an action for a partition of the real estate of which the testator died seized, certain real estate was allotted and set off to each of the daughters to be vested, as the decree declared, in her during her life, with remainder in fee to her issue. Subsequently the sole surviving executor executed to each of the daughters a testimonial, as required by the will. M., one of said daughters, died in 1889, leaving a will by which she devised all of her property to plaintiff, her husband, who subsequently entered into a contract to sell and convey a portion of the real estate set apart to her by said decree, by full covenant warranty deed to K., who, upon being tendered such a deed, refused to complete the purchase, alleging that plaintiff did not own the fee. Upon a case submitted under the Code, *held*, that upon the execution and delivery of the certificate the absolute fee in the lands set apart for her was vested in M.; that this included the lands set apart for her in the partition suit; and so that by her will the fee of the lands in question became vested in plaintiff, and he was entitled to a specific performance of the contract. *Id.*

6. Also *held*, that the rights of M. and her devisee were not affected by the provision of the decree in partition declaring that she had simply a life estate, as that estate was subsequently changed into a fee by the executor's certificate. *Id.*

7. A testator may so dispose of his real estate that it will, upon his death, vest in his heirs by operation of law, subject to be divested upon the happening thereafter of a contingency provided for in the will. *Lougheed* v. *D. Bap. Church.* 211

8. The will of D,, after a devise to his wife of a life estate in all his real estate, contained a devise of certain lands, commencing as follows: "At the death of my wife, I give and devise," etc. The devise was to a religious society, the land to be used as a parsonage; the devise providing that whenever the society ceased to so use it, it should revert to the testator's heirs. The society was unincorporated at the time of the testator's death, but was incorporated during the life of his widow. In an action for partition brought by one of the heirs of D., who claimed the devise to be void, *held*, untenable; that the terms of the will showed the intent of the testator to be to vest the estate in the devisee at the time of, and not before, the death of the wife, and if the devisee at that time should be able to take, the devise was valid, the title to the remainder being in the heirs from the time of the testator's death to that of his widow, subject to be divested if the devisee at the time of her death was an existing corporation capable of taking, in which event the title would vest in it. *Id.*

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